No. 88-334-CFX
Status: GRANTED

Docketed:
August 24, 1988

Title: John S. Lytle, Petitioner
v.
Household Manufacturing, Inc., dba Schwitzer Turbochargers

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Reed,Judith

Counsel for respondent: Dennard Jr.,H. Lane, Clarke,A. Bruce

Entry	Date	Note	Proceedings and Orders
1	Jul 14 1988	G	Application (A88-46) to extend the time to file a petition for a writ of certiorari from July 26, 1988 to August 25, 1988, submitted to The Chief Justice.
2	Jul 19 1988		Application (A88-46) granted by the Chief Justice extending the time to file until August 25, 1988.
3	Aug 24 1988	G	Petition for writ of certiorari filed.
4	Sep 23 1988		Brief of respondent Household Manufacturing Inc. in opposition filed.
5	Sep 28 1988		DISTRIBUTED. October 14, 1988
6	Jun 16 1989		REDISTRIBUTED. June 22, 1989
8	Jun 23 1989		REDISTRIBUTED. June 29, 1989
9	Jul 3 1989		Petition GRANTED.
			**********
11	Aug 1 1989		Order extending time to file brief of petitioner on the merits until September 2, 1989.
13	Sep 1 1989		Joint appendix filed.
14	Sep 1 1989		Brief of petitioner John S. Lytle filed.
16	Sep 18 1989		Order extending time to file brief of respondent on the merits until October 19, 1989.
12	Sep 29 1989		Record filed.
		*	Certified copy of original record and proceedings, 8 volumes, box, received.
17	Oct 19 1989		Brief of respondent filed.
18	Oct 19 1989		Brief amicus curiae of Equal Employment Advisory Council filed.
19	Nov 13 1989	G	Application (A89-365) to extend the time to file a reply brief from November 18, 1989 to November 28, 1989, submitted to The Chief Justice.
20	Nov 14 1989		Application (A89-365) granted by the Chief Justice extending the time to file until November 28, 1989.
21	Nov 27 1989		SET FOR ARGUMENT MONDAY, JANUARY 8, 1990. (3RD CASE)
22	Nov 28 1989		Reply brief of petitioner filed.
23	Nov 30 1989		CIRCULATED.
24	Jan 8 1990		ARGUED.

88-394

No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN S. LYTLE,

Petitioner,

v.

HOUSEHOLD MANUFACTURING INC.,
d/b/a SCHWITZER TURBOCHARGERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the Fourth Circuit correctly hold that district court violations of the Seventh Amendment are unreviewable by the appellate courts if the trial judge, after violating the Amendment by refusing to empanel a jury, compounds that constitutional infraction by deciding himself the very factual issue which should have been presented to and decided by a jury?

PARTIES

All parties in this matter are set forth in the caption.

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IN THE

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, John S. Lytle, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit entered in this proceeding on October 20, 1987.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is unpublished, and is set out in the Appendix to this petition at pages 1a-21a. The order of the court of appeals denying rehearing, which is not reported, is set out at pp. 22a-24a of the Appendix. The district judge's bench opinion, which is unreported, is set out in the Appendix, at pp. 25a-31a. The order of the district court dismissing the case is set out in the Appendix at pp. 34a-35a.

JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of the case was entered on October 20, 1987. (App. 1a.) A timely petition for rehearing was denied on April 27, 1988.

On July 19, 1988, Chief Justice Rehnquist entered an order extending the time for filing a petition for writ of certiorari to and including August 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Section 1981 of 42 U.S.C. provides:

> All persons within the jurisdiction of the united States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-(2)(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or

> otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin....

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

> Such demand may be indorsed upon a pleading of the party.

Rule 39 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

Petitioner filed this action in December, 1984, alleging that the respondent employer had engaged in racial discrimination in violation of Title VII of the 1964 Civil Rights Act and of 42 U.S.C. § 1981. Petitioner claimed specifically that respondent had fired

him because of his race, and that respondent subsequently had retaliated against him because he had filed a charge of discrimination with the EEOC. Petitioner requested a jury trial on his section 1981 claims.

Petitioner's discrimination claims raised several straightforward factual issues. Petitioner was dismissed in August of 1983 after he had missed two days of work due to illness. Petitioner asserted that he had notified respondent in advance that he would be absent, and that company officials had agreed to his taking the days off. Company officials insisted that the absence was in fact unexcused. There was also conflicting evidence regarding how respondent treated white workers who had problems with absenteeism.

The district court dismissed plaintiff's claims under section 1981, holding -- despite Runyon v. McCrary, 427 U.S. 160 (1976) and Johnson v. Railway Express Agency, 421 U.S. 454 (1975)-- that Title VII ordinarily provides the exclusive remedy for employment discrimination. (App. 26a). Having thus removed petitioner's legal claims, the district judge conducted a bench trial on the equitable Title VII claims. At the close of the plaintiff's case, the district judge dismissed the discriminatory discharge claims; following the close of all the evidence, the judge ruled from the bench in favor of respondent on the retaliation claim. (App. 26a-31a). The trial judge subsequently entered a judgment for defendant on all issues. (App. 32a-35a).

Petitioner appealed to the Fourth Circuit, arguing, inter alia, that he had been denied his right to a jury trial in violation of the Seventh Amendment. A majority of the Fourth Circuit panel acknowledged that the dismissal of petitioner's § 1981 claim, and thus the denial of a jury trial, was "apparently erroneous." (App. 7a n.2). The panel concluded, however, that that constitutional error was "not controlling," because an appellate court was powerless to correct any such Seventh Amendment violation. The panel insisted that the district judge's decision on the merits of petitioner's allegations, even though issued in contravention of the Seventh Amendment, could be relied on to collaterally estop the petitioner from litigating the claims involved before a jury. (App. 8a-9a). Finding that the

judge's resolution of the factual issues was "not clearly erroneous," the majority affirmed. (App. 10a-13a).[1]

Judge Widener, in a dissenting opinion, noted that the majority's view of collateral estoppel was inconsistent with a seventh circuit decision on "exactly this issue" in Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987) (App. 19a), and that it was "not consistent with" the recent decision of this Court in Tull v. United States, 95 L.Ed.2d 365 (1987). (App. 19a

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[1] The district judge found that petitioner had failed to establish a prima facie case with regard to his dismissal claim. (App. 26a-29a). The court of appeals reasoned that whether or not petitioner had made out a prima facie case turned on a number of disputed subsidiary facts; the appellate court found that the trial judge's resolution of those subsidiary issues, and thus his conclusion regarding the sufficiency of the evidence to establish a prima facie case, were not clearly erroneous. (App. 10a-12a).

n.4). Judge Widener criticized the majority's reliance on the earlier Fourth Circuit decision in Ritter v. Mount Saint Mary's College, 814 F.2d 986 (4th Cir. 1987), insisting that the circumstances and thus the issue in Ritter were "significantly different" than in the instant case. (App. 18a). Judge Widener concluded that if the appellate courts were powerless to correct the erroneous denial of a jury trial merely because the judge involved had issued a constitutionally tainted decision of his own on the merits, "the Seventh Amendment means less today than it did yesterday." (App. 19a). A timely petition for rehearing and suggestion for rehearing en banc were denied; Judges Widener, Russell and Murnaghan voted to rehear the case en banc. (App. 22a-24a).

REASONS FOR GRANTING THE WRIT

I. THE HOLDING OF THE FOURTH CIRCUIT HAS BEEN EXPRESSLY REJECTED BY FOUR OTHER CIRCUITS, AND IS INCONSISTENT WITH THE PRACTICES OF NINE OTHER CIRCUITS

As Judge Widener observed in his dissenting opinion below, (App. 19a), this case presents a clear conflict among the circuits regarding a problem of considerable importance -- whether Seventh Amendment violations are rendered unreviewable if the trial judge who improperly denied a jury trial compounds that constitutional error by deciding himself the very issue that should have been decided by a jury. The Fourth Circuit has now twice held that such constitutional violations can neither be reviewed nor corrected on appeal. These decisions of the Fourth Circuit are flatly inconsistent with the practice in nine other circuits, and the reasoning of the

decision below has been expressly rejected by recent decisions in the Second, Third, Seventh and District of Columbia Circuits.

These inter-circuit conflicts arise out of a dispute regarding the meaning of this Court's decision in Parklane Hosiery v. Shore, 439 U.S. 332 (1979). In Parklane Hosiery certain factual issues, regarding which the petitioner would otherwise have been entitled to a jury trial, had earlier been decided adversely to petitioner by a trial judge in another action. This Court held that collateral estoppel, based on a prior decision in a non-jury trial, could be used to preclude litigation of those same issues before a jury. 439 U.S. at 333-37. Footnote 24 of the majority opinion expressly noted that the lack of a jury in the earlier proceeding, an equitable injunctive action brought by the SEC, was entirely proper.

439 U.S. at 337 n. 24.[2] But the majority opinion was silent regarding whether collateral estoppel might also be available where the earlier denial of a jury trial was erroneous, and as to whether collateral estoppel might be invoked in order to prevent correction of that very error. In a dissenting opinion in Parklane Hosiery, Chief Justice Rehnquist warned that the majority opinion might be interpreted as calling into question the longstanding rule that an intervening non-jury decision on the merits of a case did not preclude an appellate court from reversing the earlier improper denial of a jury trial. 439 U.S. at 351 n. 19.[3]

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[2] See also 439 U.S. at 351 n. 18 (Rehnquist, J., dissenting).

[3] "Meeker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963) (per curiam), is a case where the doctrine of collateral estoppel yielded to the right to a jury

The Fourth Circuit's expansive view of Parklane Hosiery began last year in Ritter v. Mount Saint Mary's College, 814 F.2d 986 (4th Cir. 1987), cert. denied ___ U.S. ___ (1987).[4] In Ritter, the Fourth

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trial. In Meeker, plaintiffs asserted both equitable and legal claims, which presented common issues, and demanded a jury trial. The trial court tried the equitable claim first, and decided that claim, and the common issues, adversely to plaintiffs. As a result, it held that plaintiffs were precluded from relitigating those same issues before a jury on their legal claim.... Plaintiffs appealed, alleging a denial of their right to a jury trial.... This Court reversed ... on the basis of Beacon Theatres Inc. v. Westover, 359 U.S. 500 (1959) and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), even though, unlike those cases, the equitable action in Meeker had already been tried and the common issues determined by the court. Thus, even though the plaintiffs in Meeker had received a "full and fair" opportunity to try the common issues in the prior equitable action, they nonetheless were given the opportunity to retry those issues before a jury. Today's decision is totally inconsistent with Meeker and the Court fails to explain this inconsistency."

[4] In opposing review by this Court in Ritter, the respondent emphasized that the trial judge's resolution of the

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equitable Title VII claim in that case had been upheld in an earlier appeal, and was thus not in dispute when it was relied on to collaterally estop the plaintiff from receiving a jury trial. The respondent in Ritter conceded that the application of collateral estoppel in the circumstances presented by the instant case would be both incorrect and inconsistent with the Seventh Circuit decision in Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987):

> "In Ritter, petitioner had numerous opportunities to avoid the application of collateral estoppel, but availed herself of none.... During her first appeal she had the opportunity to seek prevention of the application of collateral estoppel by requesting reversal of the Title VII judgment based on the arguments she makes here.
>
> "In Hussein ...[u]nlike Ritter ... [t]he Seventh Circuit was requested to invoke collateral estoppel in Hussein's first and only appeal. If it did so, Hussein would have been deprived of any opportunity to develop his legal claims and present them to a jury....
>
> "... Ritter and Hussein differ because there was an earlier valid and reviewed judgment in Ritter, but not in Hussein. The Fourth Circuit reviewed and affirmed the Title VII judgment in the first appeal, and was

Circuit acknowledged that the trial judge, in passing on the disputed facts rather than referring them to a jury, had violated the Seventh Amendment, but insisted that it was permitted, indeed required, to give conclusive weight to that very constitutionally tainted decision. "The fact that the judge in this case was in error in dismissing the legal claims ... is irrelevant." 814 F.2d

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not asked to vacate that judgment until the second appeal.... Hussein, on the other hand, presented a situation where there was no earlier valid judgment. The Title VII judgment there was on review for the first time so the appellate court was not asked to vacate its earlier judgment. The Seventh Circuit used the lack of an earlier valid judgment in its attempt to distinguish Parklane.... That distinction is absent in the instant case."

Respondent's Brief in Opposition, No. 87-309, pp. 6-7.

at 991.[5] Even though the bench trial that had occurred in Ritter violated the constitution, the fourth circuit insisted, "One trial of common facts is enough." Id. A plaintiff's right to the constitutional trial guaranteed by the Seventh Amendment, it reasoned, had to give way under Parklane Hosiery to "the interests of the judicial system in a speedy and economical resolution of litigation." Id. The fact that a plaintiff would lose his or her right to a jury trial because of the error of the trial judge was, in the words of the circuit court, only "apparently unfair." 814 F.2d at 991.

The panel decision in the instant

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5 This Court subsequently held that state courts cannot rely on such constitutionally infirm prior decisions. Johnson v. Mississippi, 100 L.Ed.2d 575 (1988).

case expands Ritter[6] and Parklane Hosiery to the point where they virtually preclude enforcement of the Seventh Amendment following an unconstitutional non-jury verdict. First, the decision below extends Ritter to a case in which the validity of the non-jury verdict on the equitable issues was itself challenged on direct appeal; as Judge Widener noted in his dissent, the plaintiff in Ritter was not challenging that portion of the district judge's action in that case. (Pet. App. 17a). Second, the panel in the instant case holds that, since the appellate courts are powerless to correct

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6 Judge Widener observed in his dissenting opinion below that the circumstances of Ritter were distinguishable from those of the instant case, since at the time when the collateral estoppel issue arose the plaintiff in Ritter was no longer challenging the trial judge's rejection of her equitable Title VII claims. (App. 17a-18a).

a Seventh Amendment violation, a circuit court simply has no reason to decide whether the action of the trial judge denied one of the parties its constitutional right to trial by jury.

> This court held in Ritter ... that the findings of the trial court made in a Title VII action are entitled to collateral estoppel effect, thus preventing relitigation of those facts before a jury under a "legal" theory arising out of the same facts. We found that collateral estoppel would obtain even where the trial court had erroneously dismissed the plaintiff's legal claims. As the Supreme Court determined in Parklane Hosiery ..., the judicial interest in economy of resources is sufficient to override the litigant's interest in relitigating his case, even where the consequence of the failure to permit relitigation is to deny the plaintiff his right to a jury trial. Whether the district court has committed error in striking the appellant's [legal] claims ... is not controlling.

(App. 8a-9a). It is perhaps coincidental, but nonetheless disturbing, that these two

landmark Fourth Circuit decisions, holding that the unconstitutional denial of a jury trial cannot be corrected on appeal, both come in cases in which the underlying legal claim involved intentional invidious discrimination, in which the unconstitutional bench trial resulted in a judgment for the defendant, and in which, at least in the instant case, the trial court's reasons for denying a jury trial seem insubstantial.[7]

No other circuit permits the use of collateral estoppel to prevent correction on appeal of an unconstitutional denial of a jury trial. The interpretation of

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7 In the instant case, the Fourth Circuit noted that the legal claims stricken by the district judge had long before been held by that court of appeals to state a cause of action. (Pet. App. 7a, n. 2). The first Fourth Circuit opinion in Ritter, holding that the legal claims in that case were not properly dismissed prior to trial, is not published. (See App. 16a).

Parklane Hosiery embraced by the Fourth Circuit in this case and Ritter has twice been expressly rejected by the Seventh Circuit. Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988). The procedural posture of Hussein was precisely the same as that in the instant case; after the trial judge there erroneously dismissed the plaintiff's legal claims and then decided himself the underlying factual questions, the defendant insisted on appeal that Parklane Hosiery precluded an appellate court from correcting such a constitutional violation. The Seventh Circuit rejected this interpretation of Parklane Hosiery:

> Oshkosh Truck argues that, despite the prohibitions of the seventh amendment and the concerns noted in Beacon Theatres, the Supreme Court's holding in Parklane Hosiery ... requires us to apply collateral estoppel in this case....

> We believe that the present case prevents a substantially different situation than that before the Supreme Court in Parklane. Here, there is no earlier valid judgment....
>
> It is hardly "needless litigation" to reverse a judgment on the ground that the plaintiff was denied his right to a jury trial through no fault of his own solely because of the error of the trial court. It is inappropriate to apply collateral estoppel to preclude review of an issue on which the appellant could not have previously sought review.... The burden on judicial administration is no more than in other situations in which legal error is committed and a retrial is required.... We cannot sanction an application of collateral estoppel which would permit findings made by a court ... to bar further litigation of a legal issue ... when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim. To permit such an application would allow the district court to accomplish by error what Beacon Theatres otherwise prohibits it from doing.

816 F.2d at 355-57. Judge Posner noted in a concurring opinion that he "agree[d] with everything in" the majority opinion regarding collateral estoppel. The Seventh Circuit rule that collateral estoppel cannot prevent direct appellate review of the denial of a jury trial was reiterated in Volk v. Coler, 845 F.2d at 1437-38. See also id. at 1439 (Manion, J., concurring).

The reasoning and holding in Ritter were also expressly rejected by the Third Circuit in Roebuck v. Drexel University. (No. 87-1301, July 26, 1988). The plaintiff in that case had sought relief from racial discrimination under both section 1981 and Title VII. The district judge initially permitted the 1981 case to be heard by a jury, but when the jury returned a verdict for the plaintiff, the trial judge granted judgment n.o.v. and

ruled for the defendant on the Title VII claim. On appeal the Third Circuit held that the judge had erred in overturning the jury verdict, and ordered a new jury trial of the section 1981 claims.[8] Rejecting the Ritter doctrine that the judge's own decision on the Title VII claim controlled, and thus precluded, a new jury trial, the Third Circuit adopted the opposite rule, vacating the judge's decision on the Title VII claim, and directing him on remand to await, and conform his disposition of that claim to, the jury verdict on the section 1981 claim.

> We acknowledge that in Ritter ... the court held that a district court's findings in a Title VII suit are preclusive in a subsequent trial to a jury on an ADEA claim, even though the ADEA claim itself was filed jointly with the Title VII claim

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[8] A new trial was required for other reasons.

> but had been erroneously dismissed by the district court..... [T]o avoid the problems faced by the Fourth Circuit in Ritter ..., we believe that the better course is that followed by the Seventh Circuit in Volk v. Coler.... In Volk, the court held that where plaintiff had presented sufficient evidence on her §§ 1983 and 1985(3) claims to allow the case to go to the jury, but the district court had improperly taken the case away from the jury, plaintiff was "entitle[d] to a jury trial on the [legal] claims before the trial court decides her Title VII equitable claims." .... Hence, the court set aside the district court's premature Title VII judgment and we do likewise. Cf. Hussein v. Oshkosh Motor Trucks Co.[9]

The Third Circuit expressly disapproved the Fourth Circuit's interpretation of Parklane Hosiery,[10] and noted that Ritter

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[9] Slip opinion, pp. 51-53 (footnote omitted; emphasis in original).

[10] Slip opinion, p. 52 n. 42 ("The Ritter court relied heavily on Parklane Hosier Co. v. Shore.... We, however, find Parklane Hosiery inapposite because, unlike Parklane plaintiff here brought his Title VII and § 1981 suits together and

seemed "inconsistent with th[e] weight of authority."[11]

The Fourth Circuit rule is inconsistent as well with decisions of the District of Columbia and Second Circuits.

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hence is entitled to a jury determination of all common issues of fact.") (emphasis in original).

[11] Slip opinion, p. 49 n. 39. The Fourth Circuit rule in the instant case -- that a judge's decision regarding jury issues must be affirmed, despite the Seventh Amendment, unless clearly erroneous under Rule 52 -- was summarily rejected by the Third Circuit in EEOC v. Corry Jamestown Corp., 719 F.2d 1219, 1225-26 (3rd Cir. 1983) ("Corry Jamestown is mistaken when it argues that the denial of a jury trial is harmless error unless the district court's findings of fact can be shown to be clearly erroneous. To the contrary, denial of a jury trial is reversible error unless a directed verdict would have been appropriate.... In this case ... the Commission's evidence was clearly sufficient to withstand a directed verdict.... The order of the district court striking the Commission's demand for a jury trial will be reversed, and the case remanded for a new trial before a jury." Compare App. 9a (petitioner not entitled to remand for jury trial, despite improper denial of jury trial, if intervening decision on merits by trial judge "was not clearly erroneous").

In Bouchet v. National Urban League, 730 F.2d 799 (D.C.Cir. 1984), the plaintiff complained that the district judge had improperly dismissed her legal claims, and then resolved against her the similar issues raised by her equitable claims. The District of Columbia Circuit concluded that it was obligated to decide whether the dismissal of the plaintiff's legal claims and the resulting denial of a jury trial were proper, since an error in that regard would require not merely a jury trial on the legal claims, but also reversal of the judge's decision as to the equitable claims. Writing for the panel in that case, then Judge Scalia explained:

> [An] erroneous denial of her ... law claims and the consequent denial of her demand for jury trial would infect the disposition of her [equitable] claim as well, since most if not all of its elements would have been presented to the wrong trier of fact. Not only would a jury trial on her tort claims be

> required, but the [equitable] judgment -- even if otherwise valid -- would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury.

730 F.2d at 803-04. This holding in Bouchet was quoted and expressly endorsed by the Second Circuit in Wade v. Orange County Sheriff's Office, 844 F.2d 951, 954-55 (2d Cir. 1988).[12] The Fourth Circuit in Ritter, on the other hand, disapproved Judge Scalia's opinion in Bouchet as inadequately reasoned.[13]

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12 The Second Circuit has also recognized the conflict between the Fourth Circuit decision in Ritter and the Seventh Circuit decision in Hussein. Richardson Greenshields Securities, Inc. v. Lau, 825 F.2d 647, 651 n. 4 (2d Cir. 1987).

13 814 F.2d at 991:

> "The Bouchet proposition is ... set forth without reference to Parklane, despite the clear relevance of that case to the issues presented. We find th[is] lower court opinio[n] unpersuasive...."

The decisions of the Fourth Circuit in the instant case and Ritter are also squarely contrary to the practice of nine other circuits, which in the period since Parklane Hosiery have reversed and remanded for a jury trial district court decisions that had improperly denied such jury trials, despite the fact that in each case the trial judge, after denying the jury demand, had himself resolved on the merits the issues on which a jury trial had been sought.[14]

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14 Marshak v. Tonetti, 813 F.2d 13 (1st Cir. 1987); Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987); Lewis v. Thigpen, 767 F.2d 252 (5th Cir. 1985); Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985); Amoco Oil Co. v. Torcomian, 722 F.2d 1099 (3d Cir. 1983); EEOC v. Corry Jamestown Corp., 719 F.2d 1219 (3d Cir. 1983); Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982); Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316 (8th Cir. 1981); Palmer v. United States, 652 F.2d 893 (9th Cir. 1981); United States v. State of New Mexico, 642 F.2d 397 (10th Cir. 1981); United States v. One 1976 Mercedes Benz, 618 F.2d 453 (7th Cir. 1980); Hildebrand v. Bd. of

II. THE DECISION BELOW CONFLICTS WITH EIGHT DECISIONS OF THIS COURT

Judge Widener observed in his dissenting opinion in this case that the decision of the court below "is not consistent with the broad construction of the Seventh Amendment recently given by the Supreme Court in Tull v. United States, 55 U.S.L.W. 451 (U.S. April 28, 1987)." (App. 19a). In fact the panel's opinion conflicts with a total of eight separate decisions of this Court issued over the course of more than a century.

The jury trial issue arises in this case in precisely the same way it has arisen in innumerable past Seventh Amendment appeals. The plaintiff filed a complaint containing a claim within the scope of the Seventh Amendment, and made a

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Trustees of Michigan State Univ., 607 F.2d 705 (6th Cir. 1979); Matter of Merrill, 594 F.2d 1064 (5th Cir. 1979).

timely request for a trial by jury. The district judge, after incorrectly ruling that no jury trial was required, proceeded to consider himself the factual issues raised by the complaint, and decided the case on the merits. For over 130 years this Court has consistently redressed such Seventh Amendment violations by directing that the issues improperly heard by a judge be retried before a jury.

In Tull v. United States, 95 L.Ed.2d 365 (1987), decided only sixteen months ago, the district court, after denying Tull's request for a jury trial, conducted a 15 day bench trial of the merits of the government's claims under the Clean Water Act, resolved the underlying factual disputes in favor of the government, and imposed $70,000 in civil penalties. 95 L.Ed.2d at 371. This Court, concluding that Tull was constitutionally entitled to

a jury trial on the liability issues decided by the judge, reversed the decision below and remanded the case for a jury trial. 95 L.Ed.2d at 378-79. On at least seven prior occasions, the first in 1850, this Court has reversed the erroneous denial of a jury trial and remanded the claims for trial by jury, despite an intervening decision on the merits by a trial judge.[15]

The propriety of redressing Seventh Amendment violations in this traditional manner was expressly upheld in Meeker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963) (per curiam). In Meeker, as in Beacon Theatres, Inc. v. Westover, 359

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15 Pernell v. Southall Realty, 416 U.S. 263 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963); Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932); Baylis v. Travelers' Insurance Co., 113 U.S. 316 (1885); Hodges v. Easton, 106 U.S. 408 (1882); Webster v. Reid, 52 U.S. 437 (1850).

U.S. 500 (1959), the pleadings raised both legal and equitable issues, and a jury trial was duly requested. In Beacon Theatres, which came to this Court prior to trial on a petition for a writ of mandamus, the Court held that in such cases the legal claims must be tried first before a jury, lest a premature non-jury decision on the equitable claims preclude a jury trial on those legal issues. 359 U.S. at 508-11. In Meeker, the trial judge, in violation of Beacon Theatres, had decided the equitable claims first, and then relied on his own decision in favor of defendants to deny plaintiffs a jury trial, or any other relief, on their legal claims. The Tenth Circuit, despite Beacon Theatres, held that the trial court's decision on the equitable claims precluded any jury trial on the legal claim, which alleged slander to title:

> [W]e cannot say that his finding [on the merits of the equitable issues] ... was erroneous. The Meekers would have been entitled to a jury trial of any issues remaining for determination on their [legal] claim. However, the trial court, in the exercise of its equity jurisdiction, had determined ... that the Meekers had no title.... Since the Meekers had no title that could have been slandered by the acts of the defendants, no issues were left to be tried on the Meekers' [legal] claim.

308 F.2d 875, 884 (10th Cir. 1962) (emphasis added). The plaintiffs sought review by this Court to correct "[t]he error of the Court of Appeals in holding that the petitioners were in any way estopped or prohibited from contesting" their legal claims.[16] This Court granted certiorari, and after briefing and argument reversed the Tenth Circuit per curiam, citing Beacon Theatres and Dairy

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16 Petition for Writ of Certiorari, October Term 1963, No. 46, p. 5.

Queen, Inc. v. Wood, 369 U.S. 469 (1962). 375 U.S. 469 (1963).

This case presents precisely the problem anticipated in Chief Justice Rehnquist's dissenting opinion in Parklane Hosiery. The procedural posture of this case is identical to that of Meeker, and, if Meeker is still good law, the decision below is necessarily wrong. The Fourth Circuit, however, believes that Beacon Theatres and Dairy Queen, on which Meeker was expressly based, have since been modified by Parklane Hosiery.[17] The Fourth Circuit's interpretation of the 1979 decision in Parklane Hosiery, as Judge Widener recognized, is simply inconsistent with this Court's 1987 decision in Tull. The Fourth Circuit's insistence that Seventh Amendment

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17 Ritter v. Mount Saint Mary's College, 814 F.2d 986, 990 (4th Cir. 1987).

violations are rendered unreviewable by a subsequent, albeit constitutionally tainted, decision by the trial judge, cannot be reconciled with this Court's century long practice of reviewing and overturning such trial judge decisions.

III. THE DECISION BELOW POSES SERIOUS PROBLEMS FOR EFFICIENT JUDICIAL ADMINISTRATION

The conflicts among the circuits, and between the decision below and the prior decisions of this Court, are important for three distinct reasons. First, the Fourth Circuit decision creates the unprecedented situation in which an acknowledged and prejudicial constitutional violation simply cannot be corrected on direct appeal; indeed, as the instant case demonstrates, the Fourth Circuit's approach precludes appellate panels from even deciding whether there was a constitutional violation at all. Any procedural doctrine precluding direct appellate review of an entire class of constitutional claims would be serious in and of itself. In this instance, moreover, the constitutional provision at issue is directed, not at private persons

or ordinary government officials, but solely at federal judges. If the Fourth Circuit precluded appellate review of claims that prison authorities had violated the Eighth Amendment, those claims would still be subject to evaluation by an independent federal district judge. But where an appellant asserts that a district judge himself violated the Constitution, a denial of appellate review means the appellants constitutional claim will never be heard by a disinterested federal judge.

Second, if the denial of a jury trial can no longer be litigated on direct appeal following an unconstitutional non-jury trial, the only way the appellate courts could enforce the Seventh Amendment would be to intervene prior to trial. The Fourth Circuit bar to direct appeal of such issues eliminates any ground for

denying a writ of mandamus to review a trial court order denying, or granting, a jury trial. Moreover, if, as the Fourth Circuit has held, a denial of a jury trial is no longer subject to direct appellate review after judgment in that circuit, such denials would necessarily fall within the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Until now, the collateral order doctrine has been held inapplicable to denials of jury trials precisely because the circuit courts believed that collateral estoppel could not be used after judgment to prevent appellate review of, and redress for, any Seventh Amendment violation. See e.g., Western Elec. Co. v. Milgro Electronic Corp, 573 F.2d 255, 256-57 (5th Cir. 1978). In the Fourth Circuit today interlocutory appeals are not only a technical possibility but a practical

necessity for any litigant who wishes to preserve his or her asserted right to a jury trial. In the district courts throughout that circuit, any attorney whose request for a jury trial is refused has no choice but to immediately take a protective interlocutory appeal, since he or she is unlikely to be able to raise that constitutional claim on appeal at any stage later in the proceeding.[18] Almost forty years ago in Morgantown v. Royal

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18 It would be an exaggeration to assert that the current state of the law in the Fourth Circuit is entirely coherent. Ritter was decided on April 2, 1987. Four months later, on August 26, 1987, a different panel in that circuit, without referring to Ritter, applied the traditional rule that jury trial claims may be reviewed despite an intervening decision on the issues by a trial judge. Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1987). The instant case was decided on October 20, 1987, and stamped "unpublished," a label which, under Fourth Circuit rules, means that the decision is not as a practical matter available to most attorneys. On April 27, 1988, the fourth circuit denied rehearing in the instant case by a vote of 8 to 3.

Insurance Co., 337 U.S. 264 (1949), this Court, emphasizing that denials of jury trials could be corrected on appeal, held that such denials could not ordinarily be made the subject of interlocutory appeals; Justice Frankfurter emphasized that that decision was necessary to preserve the "deep-rooted general principle" of "[n]onappealability of intermediate orders in the federal courts." 337 U.S. at 261 (concurring opinion). If, however, as Chief Justice Rehnquist feared, Parklane Hosiery has indeed overruled Meeker, then Morgantown too would be bad law.

Third, the Fourth Circuit rule necessarily extends not only to orders regarding jury trials, but more broadly to any decision regarding who is to determine the merits, or any other factual aspect, of a controversy. If, for example, a trial judge improperly referred an issue

to a magistrate, a special master, or a non-Article III judge, collateral estoppel based on the resulting decision would, under Ritter and the opinion below, preclude vindication of a litigant's right to have his or her claim decided by an Article III federal judge. The Fourth Circuit's view of collateral estoppel would seem equally efficacious in preventing direct review of many disputes regarding venue and forum non-conveniens. Similarly, direct appellate review of questions concerning if in the instant case the district judge had granted a jury trial, but had then directed that the case be tried by a jury consisting of only residents of some distant state, or of only 2 jurors, that method of jury composition would of course have been patently illegal, but its verdict under Ritter and the decision below would still

collaterally estop petitioner from trying the claims before a jury selected in a constitutional manner.

All of these problems arise on a regular basis. Since certiorari was denied less than a year ago in Ritter, there have been four other circuit court opinions on the same issue. Wade, Roebuck and Volk in the Second, Third and Seventh Circuits, respectively, have rejected the holding in Ritter, while the instant case has applied and extended Ritter.

IV. THE DECISION BELOW SHOULD BE SUMMARILY REVERSED

In the instant case the substantive legal claim for which petitioner sought a jury trial was an allegation that respondent had violated 42 U.S.C. § 1981 by engaging in racial discrimination in employment. The application of section 1981 to private discrimination in contractual relations, upheld by this

Court in Runyon v. McCrary, 427 U.S. 160 (1976), is now the subject of the scheduled reargument in Patterson v. McLean Credit Union, No. 87-107. Under ordinary circumstances the appropriate disposition of this proceeding would be to hold the petition and defer action until the decision in Patterson. See R. Revesz and P. Karlan, "Nonmajority Rules and the Supreme Court," 136 U.Pa.L.Rev. 1067, 1109-31 (1988).

This case presents a problem, however, which warrants a departure from that practice. If action is deferred pending the decision in Patterson, it is likely that the instant case could not be heard until the October 1989 term, and would not be decided until the spring of 1990. In the intervening years, the decision below, in conjunction with Ritter, will inexorably lead to

considerable confusion and a serious dissipation of judicial resources. Any informed attorney defending on appeal the denial of a jury trial, excepting perhaps in the Second, Third, Seventh and District of Columbia Circuits, would today argue that collateral estoppel precludes appellate consideration of that issue; similar contentions would be equally plausible in appeals regarding venue, forum non conveniens, and any other issue concerning the identity of the correct trier of fact. Any Fourth Circuit attorney whose request for a jury trial is denied in a district court must now pursue an immediate interlocutory appeal, and any attorney who thinks a jury trial was improperly granted undoubtedly must also appeal at once, rather than await final judgment. Cautious lawyers may well feel obligated to do the same in other

circuits, or to file such appeals regarding other types of disputes about the identity of the proper trier of fact. A significant portion of all now pending federal civil cases could well become embroiled in the ensuing tangle of interlocutory appeals, motions, and arguments.

The questions raised by the instant case, however they are to be resolved, ought be resolved with dispatch. If, as has been the law in the past, jury trial and other related issues can still be addressed on direct appeal after final judgment, that should be reaffirmed before the decision below and Ritter wreak havoc in the federal appellate courts. If, on the other hand, interlocutory appeals will henceforth be the only method of raising jury trial and similar trier of fact issues in the circuit courts, federal

litigants throughout the nation ought be told that promptly, before continued reliance on the contrary majority rule creates enormous problems of unfairness and retroactivity.

A prompt resolution of this question might be achieved by granting certiorari and accelerating the time for briefing and arguments, or by granting certiorari and summarily reversing the decision below. We believe that summary reversal would be appropriate. The Fourth Circuit's decision is squarely contrary to the century long practice, in this Court and the circuit courts of appeals, of reviewing on appeal claims that a litigant was improperly denied a jury trial. The decision below that collateral estoppel precludes any appellate consideration of such a claim flies in the face of this Court's decision in City of Morgantown v.

Royal Insurance Co., 337 U.S. 254, 258 (1949), that "[t]he rulings of the district court granting or denying jury trials are subject to the most exacting scrutiny on appeal." Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), held that

> [O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

369 U.S. at 510-11. Surely the Court did not intend that a trial judge's own error in refusing to permit a jury trial, a circumstance present in Dairy Queen itself, could constitute one of the "imperative circumstances" warranting loss of the right to a jury trial; were that the rule, the holding in Dairy Queen would literally be inapplicable in any case in which Dairy Queen itself was violated.

Parklane Hosiery emphasized that collateral estoppel could only be invoked with regard to an earlier decision that had been "fully litigated." 439 U.S. at 327, 328. In the instant case, however, the merits of petitioner's Title VII claims have not been fully litigated; on the contrary, the correctness of the trial judge's action in deciding himself the Title VII claims is one of the central issues in this appeal. Rather than giving collateral effect to a fully litigated issue, the decision below invoked collateral estoppel in order to prevent full litigation, indeed to prevent any appellate consideration at all, of petitioner's claim that the trial judge violated the Seventh Amendment in improperly passing on the merits of the Title VII claims.

The action of the Fourth Circuit bespeaks, not simply a misunderstanding of this Court's Seventh Amendment decisions, but a considered determination to ignore those precedents. On April 2, 1987, the Fourth Circuit held in Ritter that an appellate court could not correct a Seventh Amendment violation by directing that issues improperly decided by a judge be referred instead to a jury. On April 28, 1987, this Court in Tull v. United States, unanimously issued precisely the type of remedial order held impermissible in Ritter. Yet on October 20, 1987, the Fourth Circuit panel in the instant case insisted that appellate courts were powerless to provide the very remedy awarded in Tull less than seven months earlier. Judge Widener, in his dissenting opinion below, correctly observed that the

panel's action "is not consistent with ... Tull v. United States." (App. 19a n. 4).

This Court does not lightly take summary action on the basis of a certiorari petition and opposing papers, in part because of the possibility that summary disposition may fail to come to grips with the full ramifications of a novel issue, in part because of the risk of unfairness to the opposing party. The question raised by this case, however, is not new; it has arisen in this Court and been resolved in a manner contrary to the decision below on repeated occasions over the course of more than a century. The instant petition, by expressly suggesting that this is an appropriate case for summary disposition, affords respondent a reasonable opportunity to present in its memorandum in opposition arguments supporting the decision below or urging

that the issues are of sufficient complexity to warrant full briefing and argument.

CONCLUSION

For the above reasons, certiorari should be granted to review the judgment and opinion of the Fourth Circuit, and the decision below should be summarily reversed.

Respectfully submitted,

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APPENDICES

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1097

John S. Lytle,

Plaintiff - Appellant,

versus

Household Manufacturing, Inc.
d/b/a Schwitzer Turbochargers,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. David B. Sentelle, District Judge. (CA-84-453-A-C)

Argued: January 6, 1987
Decided: October 20, 1987

Before WIDENER and CHAPMAN, Circuit Judges, and SIMONS, District Judge for the District of South Carolina, sitting by designation.

Penda Denise Hair (Julius L. Chambers; Ronald L. Ellis; Regan A. Miller; James,

McElroy & Diehl on brief) for appellant; Alan Bruce Clarke (H. Lane Dennard, Jr.; Ogletree, Deakins, Nash, Smoak & Stewart on brief) for appellee.

CHAPMAN, Circuit Judge:

The appellant's action for discriminatory discharge and retaliation for filing a charge of discrimination with the Equal Employment Opportunity Commission was brought under both 42 U.S.C. § 1981 and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The district court dismissed the § 1981 action with a ruling that Title VII provided the exclusive remedy for employment discrimination. A bench trial followed on the Title VII claim. At the conclusion of the plaintiff's case the trial court under Fed. R. Civ. P. 41(b) dismissed the claim for discriminatory discharge, and at the conclusion of all of the evidence the court found for the

defendant on the retaliation claim. The appellant now argues that the trial court erred in dismissing his § 1981 action and that he is entitled to a jury trial on his § 1981 action. We hold that the district court's findings in the Title VII trial collaterally estop the appellant from relitigating these findings before a jury, and we affirm the result reached by the district court.

I.

John S. Lytle had been employed as a machinist for two and one-half years in Household Manufacturing's North Carolina plant. Immediately prior to the discharge which gave rise to this suit, it appears that Lytle had been ill, and had accordingly planned to see a physician on Friday, August 12, 1983. Lytle asked on the day prior to August 12 if he could take the next day off as a vacation day.

Lytle's supervisor informed him that he could take Friday off only he worked on Saturday [sic].

Lytle never informed his supervisor that he would take Friday as a vacation day in exchange for working on Saturday. Lytle claims that he was effectively prevented from informing his supervisor about his intentions by the supervisor's anger at Lytle, arising out of an unrelated incident. For whatever reason, Lytle failed to appear at work either on Friday or on Saturday. Lytle claims that his medical condition prevented him from working on Saturday, and that he informed the plant's Human Resources Counsellor of that problem.

The appellee classified Lytle's absences as "unexcused." Appellee's discharge policy distinguishes between excused and unexcused absences. If

unexcused absences exceed eight hours in a twelve month period it is grounds for dismissal. Accordingly, the appellee terminated Lytle's employment.

Subsequent to his termination, Lytle filed a charge of discrimination with the Equal Employment Opportunity Commission. Lytle then began seeking employment with other businesses in the area, without success. Lytle attributes this failure to the appellee's refusal to provide him with a letter of recommendation beyond a mere acknowledgment that Lytle had been employed by the appellee. It appears that, in one instance, the appellee had provided another employee with an actual letter of recommendation, contrary to express company policy.

Lytle's first legal action was a claim for full unemployment benefits before the North Carolina Employment

Security Commission. The decision of the Commission was appealed to and affirmed by the Buncombe County Superior Court.[1] The Employment Commission and the Superior Court found that Lytle was entitled only to reduced unemployment benefits because his "substantial fault" had contributed his termination [sic]. Lytle filed this action on December 7, 1984 after receiving a right to sue letter from the EEOC. Lytle sought relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging that the appellee had discharged him because of his race and retaliated against him for filing a charge of discrimination with

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[1] Lytle v. Schwitzer Turbochargers and the Employment Security Commission of North Carolina, 84-CVS-1602 (Sept. 10, 1984).

the EEOC. Lytle requested a jury trial on his claims under § 1981.

The district court dismissed the appellee's motion for summary judgment, in which the appellee had argued that the decision of the State Employment Commission served to bar the proceedings. The district court stated that there were unresolved factual issues precluding summary judgment. On February 26, 1986, the district court dismissed Lytle's claims under § 1981 on the grounds that Title VII provides the exclusive remedy for employment discrimination.[2] Lytle then proceeded to try his Title VII claims before the bench. At the close of the plaintiff's evidence, the district

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[2] This ruling was apparently erroneous. In Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471 (4th Cir. 1978), cert. denied, 440 U.S. 979 (1979), we found Title VII and § 1981 remedies to be separate, independent and distinct.

court granted the defendant's motion under Fed. R. Civ. P. 41(b) to dismiss the claim of discriminatory discharge on the grounds that the plaintiff had failed to establish a prima facie case. At the close of all the evidence, the district court entered a verdict for the defendant on the retaliation claim.

II.

This court held in Ritter v. Mount Saint Mary's College, No. 86-3015 (4th Cir. filed March 23, 1987), that the findings of the trial court made in a Title VII action are entitled to collateral estoppel effect, thus preventing the relitigation of those findings before a jury under a "legal" theory arising out of the same facts. We found that collateral estoppel would obtain even where the trial court had erroneously dismissed the plaintiff's legal claims.

As the Supreme Court determined in Parklane Hosiery, Inc. v. Shore, 439 U.S. 322 (1979), the judicial interest in economy of resources is sufficient to override the litigant's interest in relitigating his case, even where the consequence of the failure to permit relitigation is to deny the plaintiff his right to a jury trial.

Whether the district court has committed error in striking the appellant's claims under § 1981 is not controlling. If the district court's determinations arrived at in the course of the bench trial on the Title VII theory are not clearly erroneous, and if the findings made by the judge, if upheld, estop the appellant from establishing a prima facie case under § 1981, then appellant may not relitigate these issues. We proceed to determine whether

the district judge erred in his findings and conclusions in the Title VII law suit.

We perceive no reason to reverse the district court's determination that the appellant failed to establish a prima facie case of discriminatory discharge. Rule 41(b) requires the court to weigh all evidence presented. The district court's finding that the plaintiff had presented no evidence of discrimination is protected by Rule 52(a) and may be set aside only if clearly erroneous. Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986). In Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir.), cert. denied, 472 U.S. 1021 (1985), we discussed the necessary elements for the establishment of a prima facie case of discriminatory disciplinary action. "The . . . prima facie requirement is . . . met upon a

showing (1) that plaintiff engaged in prohibited conduct similar to that of a person of another race, color, sex, religion, or national origin, and (2) that disciplinary measures enforced against the plaintiff were more severe than those enforced against the other person." Moore, 754 F.2d at 1105-06. Lytle has provided no evidence of other employees who had received less severe disciplinary measures as a result of their unexcused absences. Lytle has presented evidence showing that white employees who had exceeded the company limitation on excused absences had received relatively lenient treatment, but the district court was entitled to find that the differences between excused and unexcused absences are significant enough to render those violations

dissimilar.[3] Thus the first prong of the Moore test was not met. The district court was entitled to conclude that the company's treatment of employees exceeding the limitation on unexcused absences could differ from its treatment of employees exceeding the excused absence limitation, without that difference in treatment being discriminatory. Failing to present evidence of similarly situated employees experiencing different treatment, the appellant has failed to establish a prima facie case. We find the other reasons proffered by the appellant to reverse the district court's judgment pursuant to Rule 41(b) unpersuasive.

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[3] Indeed, it appears that the appellant himself was in violation of the company limitations on permissible excused absences.

We also decline to disturb the district court's judgment for the appellee on the claim that the appellee had retaliated against Lytle for his complaint to the EEOC. The appellant has offered no reasons for this court to find that the district court's conclusion was clearly erroneous, and we perceive none. We thus affirm the district court's treatment of the Title VII claim.

III.

The next issue to resolve is whether the district court's conclusions under Title VII, capable of collateral estoppel effect under Ritter and Parklane, prevent the appellant from establishing a prima facie case under his § 1981 theory. It is established beyond peradventure that the elements of a prima facie case of employment discrimination alleging disparate treatment under Title VII and §

1981 are identical. See, e.g., Gairola v. Commonwealth of Virginia Department of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985), and the cases cited therein. "The facts here that preclude relief under Title VII also preclude a Section 1981 claim." Garcia v. Gloor, 618 F.2d 264, 271 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981). Where the elements of two causes of action are the same, the findings by the court in one preclude the trial of the other, and we so hold.

Because we base our affirmance of the district court on the application of collateral estoppel to preclude the relitigation of the factual issues in this case, we do not need to reach the other issues presented by this appeal.

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

As the Seventh Circuit has pointed out: "Collateral estoppel is a 'judicially developed doctrine', United States v. Mendoza, 464 U.S. 154, 158 (1984), which, when properly applied, can 'relieve parties of the cost and vexation of multiple law suits, conserve judicial resources, and by preventing inconsistent decision, encourage reliance on adjudication.' Allen v. McCurry, 449 U.S. 90, 94 (1980)." Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348, 355 (7th Cir. 1987). The majority argues that our decision in Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987) (Ritter II) requires the application of collateral estoppel in this case. I disagree and therefore respectfully dissent.

In this court's Ritter decisions, the district court had dismissed the plaintiff's legal claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., and Equal Pay Act, 29 U.S.C. § 206(d), on First Amendment grounds. The district court then conducted a bench trial on the equitable claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000 et seq. At the close of the bench trial, the lower court made findings of fact adverse not only to the plaintiff's Title VII claims but also findings inconsistent with the maintenance of her ADEA and Equal Pay Act claims. On appeal, in an unpublished opinion we affirmed the district court's Title VII fact finding as not clearly erroneous, see Fed. R. Civ. P. 52(a), but reversed the lower court's dismissal of the plaintiff's ADEA

and EPA legal claims and remanded the case for proceedings consistent with our opinion. Ritter v. St. Mary's College, No. 81-1534 (4th Cir., June 8, 1984) (unpublished) (Ritter I).

On remand, the district court determined that its findings made in the Title VII equitable suit collaterally estopped the relitigation of those same facts before a jury on the remanded ADEA and Equal Pay Act legal actions. We affirmed that lower court ruling. Ritter II, 814 F.2d at 992. I think it most significant that no question was raised in Ritter I that the erroneous conclusion of law of the district court had deprived plaintiff of her Seventh Amendment right of trial by jury. That question was not raised until after remand in Ritter II. Having failed to appeal the issue in the first appeal, it would not seem too

unreasonable to apply collateral estoppel the second time around. Cf. Hussein, 816 F.2d at 359, Judge Posner concurring.

This case, however, is significantly different than Ritter II. Here, the lower court erroneously concluded that the § 1981 claims were precluded by the Title VII claims. By its erroneous holding that Title VII was the exclusive remedy for employment discrimination, it specifically denied the plaintiff his right to trial by jury and that is the point which is appealed. In other words, the sole reason that plaintiff has been denied his right to a jury trial is the erroneous ruling of the district court which was appealed as soon as the opportunity presented itself. This is not, therefore, a case like Ritter II where the district court's error was let slide until the second appeal. If a

litigant can be denied the right to a jury trial simply because a district court has come to a justifiable factual conclusion in a trial without a jury, the Seventh Amendment means less today than it did yesterday.[4]

Furthermore, it is significant that the Seventh Circuit, when faced with exactly this issue on indistinguishable facts, has determined that "an application of collateral estoppel does not permit findings made by a court in [a Title VII] proceeding to bar further litigation of [§ 1981] claim that had been properly joined...." Hussein, 816 F.2d at 356.

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[4] The majority's decision here, I suggest is not consistent with the broad construction of the Seventh Amendment recently given by the Supreme Court in Tull v. United States, 55 USLW 4571 (U.S. April 28, 1987). In Tull, the Court reversed our narrow reading of the right to trial by jury.

I am also disturbed by the justification of the denial of a litigant's Seventh Amendment right to a jury trial by reason of judicial interest in economy of resources. This reason undoubtedly existed at the time of the ratification of that Amendment and has since. In my opinion, however, it does not suffice as a policy argument to circumvent a positive provision of our organic law. To my way of thinking, in the event of a policy contest between judicial economy and the Seventh Amendment, the Amendment should prevail.

Accordingly, I would vacate the judgment of the district court and remand this case for trial by jury on all the issues so triable. See Ritter II, 814 F.2d at 990, citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).[5]

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5 Hussein only remanded the § 1981 claim, not the whole case, but for procedural reasons. See the concurring opinion of Judge Posner. 816 F.2d at p. 359.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-

Apr. 27, 1988

John Lytle,

Plaintiff-Appellant,

v.

Household Mfg., Inc., Inc.,
d/b/a/ Schwitzer Turbo Chargers,

Defendant-Appellee.

On Petition for Rehearing and Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc and appellee's answer thereto were submitted to this Court.

On the question of rehearing before the panel, Judge Widener voted to rehear the case. Judge Chapman and District

Judge Simons, sitting by designation, voted to deny.

In a requested poll of the court on the suggestion for rehearing in banc, Judges Russell, Widener and Murnaghan voted to rehear the case in banc; Chief Judge Winter and Judges Hall, Phillips, Sprouse, Ervin, Chapman, Wilkinson and Wilkins voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman.

For the Court

s/ JOHN M. GREACEN
CLERK

* * * *

DISTRICT COURT DECISION FROM THE BENCH
TRIAL TRANSCRIPT of FEBRUARY 26, 1986

The above-entitled matter came on for hearing on Wednesday, February 26, 1986, at Asheville, North Carolina, before the Honorable David B. Sentelle, Judge Presiding.

The following proceedings were had and taken.

THE COURT: This is the case of John S. Lytle versus Household Manufacturing, Inc. d/b/a Schwitzer Turbochargers. The first question the Court has is is that a jury case or a nonjury case?

MR. MILLER: Your Honor, this is a jury case. As we stated in our brief, both the retaliation issue and the discharge issue are cognizable under Section 1981, and we have cited cases in our brief, the Goff case, specifically

with respect to the issue of retaliation, and the Johnson v. Railway Express case with respect to the Supreme Court decision saying that the remedies offered by Section 1981 simply augment the remedies offered by Title VII and do not preclude bringing a case under 1981 and having a jury trial on those issues.

* * * *

THE COURT: I will find from the pleadings in this cause that there is no independent basis alleged in the 1981 action. I will conclude, based upon the reasoning of the Tafoya case, that Title VII provides exclusive remedy, and this case will be tried by the Court without a jury, and the 1981 claim is dismissed. Your exception is noted for the record.

* * * *

As to the discharge claim, I will make the following findings:

That the defendant is an employer who employed -- I don't recall the exact number of people, but I will make a finding that they employed a number of people for a number of hours in excess of the threshold set out with reference to Title VII cases;

I will further find that John S. Lytle was an employee of the defendant during the relevant period;

I will find that he is Black;

I will find that the company did have the attendance policy as set out in Exhibit 22, in the paragraphs headed "Excessive Absence" with the subheading "Excused Absence, Tardy, or Leaving Early," and "Unexcused Absence, Tardy, or Leaving Early;"

I will find that plaintiff has shown evidence of four white employees who violated the excused absence policy and

were given warnings, and of one white employee who had six minutes, approximately six minutes of excessive unexcused absence, tardiness, or leaving early, and that he was given a warning;

I will find by plaintiff's own evidence plaintiff had excess unexcused absence of 9.8 hours, and that, with reference to this unexcused absence, he did not follow the company policy of calling in;

I will find that the conduct on the part of the white employees is not substantially similar in seriousness to the conduct for which plaintiff was discharged.

I will conclude as a matter of law that the Court has jurisdiction of this matter, and that the plaintiff has established that he is a member of a protected category, and that he was

discharged for violation of the company's policy, but I will conclude as a matter of law that he has not established a prima facie case, since he has not established that Blacks were treated differently, and in fact committed violations of the company's policy of sufficient seriousness;

And I will order that the claim as to the discharge be dismissed.

Again, I will deny the motion as to the claim of retaliation.

* * * *

THE COURT: The only evidence to the contrary, or the evidence that that's the policy is one letter. And that doesn't make Mr. Lytle's treatment disparate, it makes Mr. Carpenter's treatment disparate; and I will, at the close of all the evidence reaffirm by prior findings of fact, add the addi-

tional finding of fact that Mr. John S. Lytle did file the charge of discrimination against Schwitzer Turbochargers with the EEOC on or about August 23, 1983;

The further finding of fact that when asked for references from prospective employers, the defendant provided only the dates of employment and the job title and, if requested, a description;

Further find as fact that that was based upon the defendant's corporate understanding of its legal right and to protect it from obligations that might be incurred by the release of negative information;

Further find as fact that defendant corporation, acting through Lane Simpson, did on one occasion grant a favorable reference letter to one terminated employee;

Further find as fact that the granting of that one favorable reference letter was done through inadvertence;

Further find as fact that there is no evidence of discrimination against John S. Lytle based upon his having made complaint to EEOC.

Conclude as a matter of law that there is no foundation in law for the retaliation claim. And the conclusion of law that I made in the first conclusion, that I have jurisdiction of this action, and I will enter a judgment in favor of the defendant on all claims.

* * * *

[Proceedings concluded.]

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Mildred N. Shields July 16, 1986

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CASE NO. A-C-84-453

Decided Mar 12, 1986

John Lytle,

Plaintiff,

v.

Household Mfg., Inc.,
d/b/a Schwitzer Turbo Chargers,

Defendant.

JUDGMENT IN A CIVIL CASE

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to trial or hearing before the

Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by reason of this action. Each party shall bear their own costs.

Date: February 27, 1986 THOMAS J. McGRAW
Clerk

s/ Lisa A. Mather
(By) Deputy Clerk

* * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

Docket NO. A-C-84-453

Decided Mar 12, 1986

John Lytle,

Plaintiff,

vs.

Household, Mfg., Inc.,
d/b/a/ Schwitzer Turbo Chargers,

Defendant.

ORDER

THIS MATTER came to be heard at the close of the plaintiff's evidence in this non-jury matter, on the defendant's motion to dismiss.

IT APPEARING to the Court that the plaintiff has failed to establish a prima

facie case of discriminatory acts by the defendant as to the plaintiff's discharge, this motion was allowed in open court.

As to the retaliation claim at the close of all the evidence, the court entered verdict for the defendant for the reasons stated in open Court.

IT IS THEREFORE ORDERED that all claims against the defendant in this case are dismissed.

This 27th day of February, 1986.

David B. Sentelle
DAVID B. SENTELLE
United States District Judge

* * * *

(2)

No. 88-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN S. LYTLE,

Petitioner,

v.

HOUSEHOLD MANUFACTURING, INC.,
d/b/a SCHWITZER TURBOCHARGERS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Court of Appeals correct in applying collateral estoppel to Petitioner's § 1981 claims after a full and fair hearing was held on his Title VII claims, the elements of which are identical to those under § 1981?

2. Does the Seventh Amendment require that Petitioner receive a new jury trial on his § 1981 claims when he failed to establish a *prima facie* case of discrimination during the trial of his Title VII claims?

LIST OF PARTIES

The Respondent, Household Manufacturing, Inc., is a wholly-owned subsidiary of Household International, Inc. All other parties in this matter are set forth in the caption.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE FACTS

Schwitzer Turbochargers manufacturers turbochargers at its facility in Arden, North Carolina. John Lytle, the Petitioner, was employed by Schwitzer as a machinist. Like many employers, Schwitzer maintains an absentee policy which distinguishes between excused and unexcused absences.[1] Excessive *excused* absenteeism is defined as a total absence level which exceeds four percent of the total

[1] Joint Appendix at 47.

available working time, including overtime.[2] Excessive *unexcused* absenteeism is defined as unexcused absences exceeding eight hours (equivalent to one work shift) in a twelve month period. Excessive absences of either type can result in termination.[3]

On Thursday, August 11, 1983, Lytle was notified that he and four other machinists would be required to work overtime on Saturday, August 13.[4] Lytle asked his supervisor, Larry Miller, if he could take Friday, August 12, as a vacation day. Miller agreed on the condition that Lytle would work on Saturday.[5] Despite this understanding, Lytle left work 1.8 hours early on Thursday and did not report or call in on either Friday or Saturday.[6] These absences gave Lytle a total of 17.8 hours of unexcused absences, or 9.8 hours of excessive unexcused absences.[7] Pursuant to company policy, Lytle was terminated on Monday, August 15, 1983, for excessive *unexcused* absences. After his termination, Schwitzer provided prospective employers with a letter of reference which included Lytle's dates of employment and job title.[8] No mention was made of the reason for his discharge or his pending EEOC charge or lawsuit.

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[2] *Id.* at 48.

[3] *Id.* at 49.

[4] *Id.* at 140.

[5] Petitioner maintained a diary while he worked at Schwitzer. In his entry for Thursday, August 11, 1983, he admits that: "At 10:30 I asked Larry for a vacation day for Friday, August 12th. He said okay, but I would have to work Saturday the 13th." J.A. at 143.

[6] *Id.* at 141-42.

[7] Petition, App. 28a.

[8] *Id.* at 93, 177-81.

STATEMENT OF THE CASE

Lytle filed suit in the United States District Court for the Western District of North Carolina alleging that he was discharged because of his race. He further alleged that Schwitzer had retaliated against him for filing a charge with the Equal Employment Opportunity Commission by refusing to provide prospective employers with a detailed letter of reference. Relying on exactly the same factual allegations, Petitioner sued under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. The district court dismissed the § 1981 claims prior to trial, holding that in the absence of an independent factual basis to support a § 1981 claim, Title VII provides the exclusive remedy for employment discrimination. At the close of Plaintiff's evidence, the court dismissed the Title VII discriminatory discharge claim pursuant to Fed. R. Civ. P. 41(b). The court also dismissed Lytle's Title VII retaliation claim at the close of all the evidence under Rule 41(b).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the district court's determination that Petitioner failed to present a *prima facie* case on his Title VII discharge and retaliation claims. After observing that the elements of proof are identical for Title VII and § 1981, the Fourth Circuit held that the district court's factual findings on the Title VII claims collaterally estopped relitigation of the § 1981 claims. Petitioner filed a motion for rehearing and rehearing *en banc* with the court of appeals. The motion for rehearing was denied by the original panel and the motion for rehearing *en banc* was denied by the full court.

Despite a complete trial on the merits followed by a thorough review by the court of appeals of his Title VII claims, Petitioner now seeks to overturn these judgments and begin anew because he was denied a jury trial in his companion § 1981 suit. Respondent submits that the holding of the court of appeals, based on the sound teachings

of this Court, provided a correct disposition of the issues raised and issuance of a writ of certiorari is, therefore, unnecessary.

SUMMARY OF REASONS FOR DENYING THE PETITION

The decision of the court of appeals is consistent with this Court's decisions in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Katchen v. Landy*, 382 U.S. 323 (1966). Therefore, this petition presents no new or important issue warranting review by this Court. Moreover, any potential error committed by the district court in dismissing the § 1981 claims was utterly harmless, since Respondent would have received a directed verdict and the case would never have reached the jury. Accordingly, this Court need not address the collateral estoppel issue or the alleged conflict between circuits to deny this petition.

ARGUMENT

I. THE FOURTH CIRCUIT'S APPLICATION OF COLLATERAL ESTOPPEL TO PETITIONER'S § 1981 CLAIMS IS CONSISTENT WITH DECISIONS OF THIS COURT

Petitioner contends that the Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), requires reversal of the Fourth Circuit's decision. *Beacon Theatres* holds that when legal and equitable claims are joined in one proceeding, the legal claims should be tried first before a jury if possible. This doctrine, although derived from the Seventh Amendment, is nothing more than a "general prudential rule" for courts to follow. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335 (1979).[9] Like most other rules of constitutional origin, the *Beacon*

[9] In *Katchen v. Landy*, 382 U.S. 323 (1966), the Court stated that the *Beacon Theatres* rule is an equitable doctrine which is inapplicable when Congress develops a statutory scheme contemplating the prompt trial of disputed claims without the intervention of a jury.

Theatres doctrine cannot be woodenly applied and must yield when outweighed by other important principles of law.[10]

In *Parklane Hosiery*, this Court addressed a conflict between the *Beacon Theatres* rule and the principle of judicial economy underlying the doctrine of collateral estoppel. Importantly, the Court noted that the major premise of *Beacon Theatres* was that a decision of a court sitting in equity could have collateral estoppel effect in subsequent legal proceedings. *Parklane Hosiery*, 439 U.S. at 334. The Court rejected the argument that the Seventh Amendment prohibits application of collateral estoppel to preclude a jury trial of facts previously decided by an equity court and found that the Seventh Amendment does not establish such a rigid barrier to the efficient operation of our legal system. Instead, the Court adopted a more pragmatic view of the Seventh Amendment, one which guarantees the plaintiff a full and fair opportunity to litigate his claims, but prohibits needless relitigation of facts already decided. Thus, application of collateral estoppel does not violate the Seventh Amendment where "there is no further fact-finding function for the jury to perform, since the common factual issues have been decided." *Id.* at 336. Using this realistic approach, the Court held that any harm caused by the denial of a jury trial was clearly outweighed by the judicial interest in the economical resolution of cases.

In *Ritter v. Mount Saint Mary's College*, 814 F.2d 986 (4th Cir.), *cert. denied*, 108 S. Ct. 260 (1987), the Fourth Circuit applied the rationale of *Parklane Hosiery* to a case in which the district court dismissed plaintiff's Age Discrimination Act[11] and Equal Pay Act[12] claims,

[10] *Cf. Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (First Amendment rights subject to reasonable restrictions).

[11] 29 U.S.C. § 621 *et seq.*

[12] 29 U.S.C. § 206(d). Unlike Title VII, both of these statutes provide for trial by jury.

and tried the Title VII claims without a jury. After determining that the legal and equitable claims shared common elements, the court held that the factual determinations made by the district judge in dismissing the Title VII suit collaterally estopped relitigation of the legal claims. The court found this situation squarely within the Court's holding in *Parklane Hosiery*, stating:

> This court need not involve itself in the laborious and inconclusive policy analysis suggested by the parties on this issue, however, because the Supreme Court has already undertaken this policy analysis for us. *Parklane* decided that the judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in re-trying before a jury the facts of a case determined by a court sitting in equity.

Ritter, 814 F.2d at 991.

The same policy considerations support the Fourth Circuit's decision in the instant case. Petitioner received a full and fair opportunity to try his claims before the district judge. His claims were involuntarily dismissed and a new trial of the same facts is unnecessary.

Petitioner seeks to distinguish *Ritter* and the Fourth Circuit's decision in *Lytle* from *Parklane Hosiery* on the grounds that the dismissal of Plaintiff's legal claims in *Ritter* and *Lytle* was erroneous. This attempted distinction is without merit. First, the distinction advanced by Petitioner does not impact the applicability of *Parklane*. The same considerations of judicial economy apply whether or not dismissal of the legal claims was in error. Second, it is far from clear that the district court erred when it dismissed Lytle's § 1981 claims and thereby denied a trial by jury. This Court has never squarely addressed the issue of whether a plaintiff can sue under *both* Title VII and § 1981 on the same factual allega-

tions.[13] In dismissing those 1981 claims, the district court relied on a line of cases decided by the Fifth Circuit and other federal courts, which hold that a § 1981 claim can be brought concurrently with a Title VII claim only if there is an independent factual basis. *See Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n. 4 (5th Cir. 1982); *Tafoya v. Adams*, 612 F. Supp. 197 (D. Colo. 1985), *aff'd on other grounds*, 816 F.2d 555 (10th Cir.), *cert. denied*, 108 S. Ct. 152 (1987).[14] Furthermore, the applicability of § 1981 to private employment, and, if applicable, the scope of such coverage, will be at issue this term when the Court hears *Patterson v. McLean Credit Union*, No. 87-107. Until this decision is rendered, the premise of Petitioner's argument is very much in doubt.

More importantly, under *Parklane Hosiery*, the critical issue is not whether the trial court's denial of the jury trial was correct, but whether harm resulted from the denial. *Ritter*, 814 F.2d at 991.[15] As long as the district judge's factual findings are not erroneous, Petitioner was not prejudiced and the judicial interests underlying the doctrine of collateral estoppel outweigh any nominal injury.[16] Otherwise, each dismissal of a legal claim would

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[13] *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), relied on by petitioner, specifically holds only that a claimant's pursuit of administrative remedies under Title VII does not toll the statute of limitations under § 1981.

[14] The Fifth Circuit has apparently retreated from this rationale. *See Hernandez v. Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139 (5th Cir. 1988).

[15] In *Parklane Hosiery*, the Court recognized that "the presence or absence of the jury as a factfinder is basically neutral." *Parklane Hosiery*, 439 U.S. at 334 n.20.

[16] Petitioner cites *Johnson v. Mississippi*, 108 S. Ct. 1981 (1988), for the proposition that erroneous decisions cannot be relied upon for collateral estoppel purposes. This citation is, at best, misleading. In *Johnson*, the court held that a prior conviction which was subsequently overturned could not be used as an aggravating factor in deciding whether to impose the death penalty. This case did not

initiate an interlocutory appeal in which the merits of the case would be indirectly determined without the benefit of a record. Alternatively, the parties must conduct a full trial to the bench with the risk it may be for naught if any of the legal claims are reversed and remanded to be tried by a jury, at a cost of substantial time and resources to the court and to the litigants. *Id.* Fortunately, in *Parklane Hosiery* this Court balanced the interests involved and found that the scale tipped in favor of applying collateral estoppel. Where, as here, Petitioner has been provided a full and fair opportunity to litigate his claims, "one trial of common facts is enough." *Ritter*, 814 F.2d at 991.

Although petitioner places great emphasis on *Beacon Theatres* and its progeny, the holdings of *Parklane*, *Ritter*, and the instant case do not vitiate the impact of these decisions. In the vast majority of cases the federal courts will continue to follow the prudential rule of *Beacon Theatres* and decide legal claims first whenever they are joined in the same action with equitable claims. In the rare case where the equitable issues are tried first, *Parklane Hosiery* holds that the Seventh Amendment does not compel the expensive, time-consuming relitigation of factual issues already decided. The Fourth Circuit's decision in the instant case comports with this philosophy and should not be disturbed.[17]

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involve collateral estoppel or the Seventh Amendment. Instead, it was based on the cruel and unusual punishment clause of the Eighth Amendment and should be disregarded.

[17] The Court's decision in *Tull v. United States*, 107 S. Ct. 1831 (1987), is not inconsistent. In *Tull*, the Court addressed the issue of whether the right to jury trial *exists* under the Clean Water Act. The Court was not faced with a situation like the instant case where the trial court after dismissing the jury claims heard the equitable claims under a parallel equitable cause of action. Therefore, *Tull* falls under the general rule of *Beacon Theatres* rather than the exception of *Parklane Hosiery* and does not apply to the case at hand.

Petitioner contends that the Fourth Circuit's holding is in conflict with other circuits. However, most of the cases relied upon by Petitioner are inapplicable to the specific question at issue in this case. In *Wade v. Orange County Sheriff's Office*, 844 F.2d 951 (2d Cir. 1988), the parties concurrently tried the § 1981 claim to the jury and the Title VII claim to the court. The jury entered a verdict for plaintiff on the § 1981 claim and the judge inconsistently ruled for defendant on the Title VII claim. The court applied the general rule of *Beacon Theatres* and held that the judge was bound by the factual conclusions of the jury. Since the legal and equitable claims were tried simultaneously, collateral estoppel was not at issue. Accordingly, this case is not relevant to the determination of the instant case.

Roebuck v. Drexel University, 852 F.2d 715 (3d Cir. 1988), is also inapposite. In *Roebuck*, the trial judge allowed the jury to hear the § 1981 claim, but set aside its verdict for the plaintiff. The district court also ruled in favor of the employer on the Title VII claims. The Third Circuit found sufficient evidence existed to defeat Drexel's motion for judgment *n.o.v.*, but agreed that the jury's verdict was against the clear weight of the evidence. Faced with such conflicting factual determinations, the only logical result was a new trial. The situation in *Roebuck* differs markedly from the one in the instant case, where the Fourth Circuit was not presented with a jury verdict and faced only the decision of the district judge. Unlike *Wade* and *Roebuck*, the district court here did not substitute its own view of the facts for the verdict of the jury.[18] Therefore, these cases do not help in the resolution of this case.

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[18] Similarly, the passage *from Bouchet v. National Urban League*, 730 F.2d 799 (D.C. Cir. 1984), cited by Petitioner, is *obiter dictum*. The actual holding of that case was that the trial judge *correctly* dismissed the legal claims and struck the jury trial demand.

Thus, of the circuit court decisions on which Petitioner relies, only the Seventh Circuit's decision in *Hussein v. Oshkosh Motor Co.*, 816 F.2d 348 (7th Cir. 1987), arguably conflicts with *Ritter* and the case at hand. In *Hussein*, the Seventh Circuit misinterpreted the teachings of *Parklane* and failed to respect its holding. In an equivocal decision which produced four opinions from a three-judge panel, the Seventh Circuit placed undue emphasis on the error of the judge in dismissing the jury rather than the consequent harm to plaintiff. As a result, the court ignored the balance of the competing policy concerns of collateral estoppel and the *Beacon Theatres* rule already provided by this Court in *Parklane*. The decision of the Fourth Circuit represents a more reasoned approach, one that is faithful to this Court's holding in *Parklane Hosiery*.

In any event, the presence of an apparent conflict between the Fourth and Seventh Circuits does not require issuance of a writ of certiorari. As discussed in more detail below, the denial of a jury trial did not affect the result in this case. (*See* Part II of this Brief, *infra*). While the Fourth and Seventh Circuits may disagree over the collateral estoppel issue, both are in agreement that a new trial is not warranted if the denial of the jury trial was harmless error. *Hussein*, 816 F.2d at 354 n.6. Even if a jury had been impaneled, Petitioner's evidence was insufficient to defeat a motion for directed verdict. Thus, resolution of the apparent conflict is unnecessary, since the case can be decided on other grounds. *See The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) (a conflict should only be resolved in the context of meaningful litigation); *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied when resolution of the conflict would not change the result below). For these reasons, this Petition should be denied.

II. DISMISSAL OF THE § 1981 CLAIMS HAD NO EFFECT ON THE OUTCOME OF THIS CASE

Assuming, *arguendo*, that the court of appeals erred in holding that relitigation of Petitioner's § 1981 claim was precluded by collateral estoppel, such error was harmless under Fed. R. Civ. P. 61 and does not warrant a new trial.[19] This Court has long recognized that when a plaintiff's evidence is insufficient to establish a *prima facie* case, the Seventh Amendment is not violated by the issuance of a directed verdict. *Galloway v. United States*, 319 U.S. 372 (1943). In *Galloway*, this Court pointed out that the Seventh Amendment guarantees both a plaintiff's right to have legitimate claims heard by a jury and a defendant's right to attack the legal sufficiency of plaintiff's evidence without protracted litigation. *Id.* at 392-93. The Court rejected the contention that the Seventh Amendment requires a new trial where, as here, plaintiff cannot establish a critical element of his claim. *Id.* at 394.

Other courts of appeals addressing this issue agree with the First Circuit that "There is no constitutional right to have twelve men sit idle and functionless in a jury box." *In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982). In *Laskaris v. Thornburg*, 733 F.2d 260 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984), the Third Circuit affirmed the district court's dismissal of plaintiff's § 1981 claims alleging politically motivated discharges. The court held that the dismissal of these claims, and the affiliated right to jury trial, constituted harmless error

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[19] This point was argued by Respondent before the court of appeals, but the court did not reach this issue. However, it is well established that a respondent can seek affirmance on any ground disclosed by the record. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

since the evidence adduced at trial was insufficient to avoid a directed verdict if a jury had been impaneled.[20]

The cases relied upon by Petitioner are not inconsistent. For example, in *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987), the court stated that before addressing the collateral estoppel issue, there must be an inquiry into whether the denial of the jury constitutes harmless error. *Hussein* 816 F.2d at 354 n.6. In fact, Petitioner agrees that if a directed verdict could have been granted, the denial of a jury trial is harmless error. *See* Petition, page 26 n. 11.

Here, Petitioner suffered no harm due to the absence of a jury. Federal Rule of Civil Procedure 50(a) governs motions for directed verdict. A directed verdict is appropriate when there is a complete absence of proof on an issue material to the cause of action or when there are no controverted issues of fact upon which reasonable jurors could differ. *Brady v. Southern Railroad*, 320 U.S. 476 (1943); 5A Moore's Federal Practice at ¶ 50.02. The evidence must be viewed in the light most favorable to the non-moving party. *Id.*

The evidence presented by Petitioner in this case, even when viewed in the most favorable light, is insufficient to defeat a directed verdict. As the Fourth Circuit correctly noted, "it is established beyond peradventure that the elements of a *prima facie* case of employment discrim-

[20] *Accord Bowles v. United States Army Corps of Engineers*, 841 F.2d 112 (5th Cir. 1988); *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987); *Howard v. Parisian*, 807 F.2d 1560 (11th Cir. 1987); *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986); *In re Professional Air Traffic Controllers Organization of America*, 724 F.2d 205 (D.C. Cir. 1984); *Atwood v. Pacific Maritime Association*, 657 F.2d 1055 (9th Cir. 1981); *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979); *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728 (10th Cir.), *cert. denied*, 389 U.S. 857 (1967).

ination alleging disparate treatment under Title VII and § 1981 are identical." Slip. op. at 7. Facts that preclude relief under Title VII also preclude a § 1981 claim. *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court established the elements necessary to make out a *prima facie* case of disparate treatment under both statutes. In *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985), the Fourth Circuit refined the elements applicable to suits, like this one, which allege discriminatory disciplinary action. The court held that to establish a *prima facie* case of racial discrimination in a case involving a discharge for violation of company rules or policies, the plaintiff must show: (1) that he is black; (2) that he was discharged for violation of a company rule; (3) that he engaged in prohibited conduct similar to that of a person of another race; and (4) that disciplinary measures enforced against him were more severe than those enforced against the other person. *Moore*, 754 F.2d at 1106.

Application of these factors to this case reveals that Petitioner failed to establish a *prima facie* case. Schwitzer's absentee policy distinguishes between excused and unexcused absences, with a stricter standard for the latter based on the greater disruptive effect of unexcused absences on Respondent's operation. It is undisputed that Petitioner left early on August 11, and did not report or call in August 12, or August 13, 1983, and that such conduct constitutes unexcused absences under Schwitzer's policies.[21] Petitioner was unable to identify a single, non-black employee guilty of a similar violation who was not also discharged. This inability to identify an individual guilty of a similar offense who was treated preferen-

[21] JA 51, 140-42.

tially prevented Lytle from establishing a vital element of a *prima facie* case. *Id.*

Petitioner attempted to support his claims through evidence of white employees who had excessive *excused* absences but were not terminated. However, Schwitzer's policies clearly distinguish excessive *excused* and *unexcused* absences. Therefore, these two violations are not "similar" as that term is used in *Moore*, and comparison of the two does not establish a *prima facie* case.

Significantly, after hearing *all* of Lytle's evidence, District Judge David B. Sentelle granted Schwitzer's motion for involuntary dismissal under Fed. R. Civ. P. 41(b) on the discriminatory discharge claim. In making this determination, the court recognized the difference between excused and unexcused absences under Schwitzer's attendance policy. (App. 27a). The court also found that the *excused* absences of white employees were not as serious as Lytle's *unexcused* absences. As a result, the court concluded that the plaintiff had not established a *prima facie* case of race discrimination.[22] Although the standards

[22] At the close of Petitioner's case, the District Judge made the following specific determinations:

> I will find *by plaintiff's own evidence* plaintiff had excess unexcused absence of 9.8 hours, and that, with reference to this unexcused absence, he did not follow the company policy of calling in;
>
> I will find that the conduct on the part of the white employees is not substantially similar in seriousness to the conduct for which plaintiff was discharged.

Based on these findings, the court concluded:

> I will conclude as a matter of law that the Court has jurisdiction of this matter, and that the plaintiff has established that he is a member of a protected category, and that he was discharged for violation of the company's policy, but *I will conclude as a matter of law that he has not established a prima facie case*, since he has not established that Blacks were treated differently, and in fact committed violations of the company's policy of sufficient seriousness;
>
> And I will order that the claim as to the discharge be dismissed.

(App. 28a-29a) (emphasis added).

vary under Rules 41(b) and 50(a), the court's decision did not rest on credibility determinations. Rather, Petitioner's inability to establish a critical element of a *prima facie* case as a matter of law would have guaranteed a directed verdict even if a jury been impaneled. Since Respondent would have received a directed verdict, the denial of a jury is harmless error and remand of the case is unnecessary.

Similarly, a directed verdict would have been proper on Lytle's § 1981 retaliation claims.[23] First, the protection of § 1981 is limited to the right to "make and enforce contracts." 42 U.S.C. § 1981. As such, it's scope is substantially less broad than that of Title VII and does not extend to claims of retaliation, even though this conduct is prohibited by Title VII. *Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *cert. granted*, 108 S. Ct. 65 (1987), *restored to calendar for reargument*, 108 S. Ct. 1419 (1988). In *Patterson*, the court reasoned that while racial harassment and, by analogy, retaliation, implicates "the terms and conditions of employment" under Title VII, it does *not* abridge the right to "make and enforce contracts." *Patterson*, 805 F.2d at 1145.[24] Similarly, in *Tafoya v. Adams*, 816 F.2d 555 (10th Cir. 1987), the Tenth Circuit held that unlike Title VII, the protections of § 1981 do not encompass a retaliation cause of action. *See also Guy v. City of*

[23] Just as with the discriminatory discharge claim, the elements of an action for retaliation under § 1981, where allowed, are the same as those under Title VII. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984).

[24] Of course, this Court will determine whether § 1981 even applies to private employment when *Patterson* is decided.

Phoenix, 668 F. Supp. 1342, 1350 (D. Ariz. 1987) (§ 1981 limited to discrimination which impacts employment decisions affecting plaintiff).

Even if § 1981 encompasses claims of retaliation, Petitioner failed to estabish a *prima facie* case. In order to establish a *prima facie* case of retaliation, Plaintiff must prove the following three elements by a preponderance of the evidence: (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection between the protected activity and the adverse action. Because Petitioner could only establish the first of the three mandatory elements, his retaliation claim was properly dismissed. *Canino v. EEOC*, 707 F.2d 468 (11th Cir. 1983) (dismissal proper when plaintiff satisfied only two elements of a *prima facie* case).

Petitioner alleged that Schwitzer treated him adversely following the filing of his EEOC charge by providing a neutral letter of reference to prospective employers which contained only his dates of employment and former job title. However, Schwitzer has a well-established company policy of providing such limited references. Respondent presented evidence of many other instances when employees who had not filed EEOC charges received the same limited reference provided for Lytle. It appears that in one case a more detailed reference was supplied, but this incident was found to be a single, unintentional aberration to an otherwise uniform company policy. Accordingly, at the end of all the evidence the district judge held that Lytle's retaliation claim was without foundation as a matter of law and entered judgment for Respondent under Rule 41(b) (App. 29-31). Thus, even if § 1981 prohibits retaliation, Petitioner's failure to establish a *prima facie* case would have warranted a directed verdict. Therefore, the denial of a jury trial was harmless error under Fed. R. Civ. P. 61.

III. SUMMARY REVERSAL IS INAPPROPRIATE IN THIS CASE

As demonstrated above, the Court should not issue a writ of certiorari in this case. The Fourth Circuit's decision is consistent with prior decisions of this Court. Moreover, the alleged conflict with the Seventh Circuit need not be resolved, since Respondent would have received a directed verdict if a jury had been impaneled. Because resolution of the apparent conflict would not change the result below, certiorari should be denied.

If the Court decides to review this case, however, the Petitioner correctly notes that the normal procedure would be to defer judgment of the case pending disposition of the closely-related case already set for argument. Contrary to Petitioner's assertions, this case presents no reason to depart from this practice. In *Patterson v. McLean Credit Union*, No. 87-107, the Court will decide whether § 1981 is applicable to discrimination in private employment. If the Court responds negatively to this question, it will remove the foundation of Petitioner's entire argument. This Petition is premised on the assumption that the district court erroneously dismissed Lytle's § 1981 claims and the concomitant right to a jury trial. By postponing disposition of this case until after the decision in *Patterson*, the Court can obviate the need to address the remaining issues of this appeal. In addition, the Court would save the parties and the Court from an unnecessary appellate argument and potentially another full trial.

Petitioner provides several hypothetical problems which could occur if the Court does not hastily dispose of his petition. A brief examination of these warnings reveals that Petitioner is merely "crying wolf." With respect to his fear that this decision will "wreak havoc on the federal appellate courts,"[25] the court of appeals' decision

[25] Petition at 46.

in this case is an officially "unpublished" opinion. Citations of unpublished opinions are disfavored by the Fourth Circuit.[26] Due to its unpublished status, its exposure to the legal community is quite limited. Even if its reasoning is incorrect, it is unlikely that this opinion will cause any disruption in the federal court system. Petitioner's use of hyperbole is unfounded.

In *Parklane Hosiery*, the Court held that in cases such as this where plaintiff is provided a full and fair opportunity to litigate his claims before a judge sitting in equity, the Seventh Amendment does not compel relitigation of the same issues before a different factfinder. This rationale, followed by the court of appeals below, provides a well-reasoned and eminently fair result. Lytle had a full opportunity to present any and all evidence and his efforts fell short. To allow these same claims to be relitigated would unduly prejudice Respondent and needlessly burden the court system. In *Parklane Hosiery*, the Court refused to read the Seventh Amendment to require such an inequitable result, and this case presents no reason to depart from this principle. If a decision as important as *Parklane Hosiery* is to be reversed or retrenched by the Court, it should not be done without briefing and argument and it should be explained to the lower federal courts in more detail than a one-sentence memorandum opinion allows. *See Harris v. Rivera*, 454 U.S. 337, 349 (1981) (Marshall J., dissenting). Accordingly, should the Court decide to grant this Petition, the parties should be allowed to fully brief and argue the issues presented.

[26] Informal Operating Procedures of the Fourth Circuit 36.4, 36.5.

CONCLUSION

Based on the foregoing reasons, this Petition for a Writ of Certiorari should be denied. Alternatively, should the Petition be granted, Petitioner's request for summary dismissal should be denied and the case should be docketed for briefing and argument following this Court's decision in *Patterson v. McLean Credit Union*, depending on the outcome in that case.

Respectfully submitted,

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Attorneys for Respondent

* Counsel of Record

No. 88-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN S. LYTLE

Petitioner,

v.

HOUSEHOLD MANUFACTURING, INC.,
D/B/A SCHWITZER TURBOCHARGERS,

Respondent.

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 23, 1988
CERTIORARI GRANTED JULY 3, 1989

The following opinions, decisions, judgments and orders have been omitted in printing in this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
12-6-84	1	Complaint; summons issued and returned to plaintiffs' attorney for service.
12-26	2	Amendment to Complaint. C/S
1-4-85	3	Answer of Deft. C/S
1-9	5	Deft.'s Amended Answer. C/S
1-30	7	Defendant's Second Amended Answer. C/S
4-19	11	Deft. Household Manufacturing, Inc.'s Motion for Summary Judgment w/supporting memorandum of law. C/S.
4-19	12	Affidavit of Al T. Duquenne.
4-19	13	Affidavit of Larry E. Miller.
4-19	14	Affidavit of Judith B. Boone.
5-9	17	Pltf.'s Memorandum in Opposition to Deft.'s Motion for Summary Judgment w/supporting affidavits of John S. Lytle, Donald E. Rancourt, Charles R. Farnham, III, William E. Ferry and Marianne Daw. C/S.

5-17	19	Order that the Defendant's motion for summary judgment be and the same is hereby denied. Copies mailed to attorneys of record.
11-27	24	Pltf.'s Supplemental Complaint. C/S.
11-27	25	Deft.'s Answer to Supplemental Complaint. C/S.
2-26		Case called for trial before the Court. Hearing on deft.'s motion to dismiss pltf.'s Sec. 1981 claim - motion allowed; Court ordered that pltf.'s claim pursuant to Title VII will proceed and will be without the presence of a jury. Opening statements to the Court by counsel. Pltf.'s evidence (see exhibit and witness lists in file.) Court recessed until 9:00 AM, 2-27-86.
2-27		Case recalled for trial before the Court. Pltf.'s motion for reconsideration of order dismissing Sec. 1981 claim - motion denied. Continued pltf.'s evidence. Testimony of Dr. Ronald Caldwell - found to be an expert in the field of medicine w/a specialty in internal medicine. Pltf. rests. Deft.'s motion to dismiss as to the wrongful discharge - motion allowed; as to retaliation charge motion denied. Deft.'s evidence (see exhibit and witness lists in file). Deft. rests. Pltf.'s rebuttal evidence. Pltf. rests. Deft. renews motion to dismiss as the close of all evidence

		as to the retaliation claim - motion allowed. Court finds there was no discriminatory practices on the part of the deft. and dismisses this action.
3-12-86	30	Order that all claims against the deft. in this case are dismissed. Copies mailed to attorneys of record.
3-12	31	Judgment that the pltf. take nothing by reason of this action. Each party to bear their own costs. Copies mailed to attorneys of record. JS-6 issued. ORDER AND JUDGMENT DOCKET XXXV, NO. 189.
4-11	32	Pltf.'s Notice of Appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

ASHEVILLE DIVISION

[Caption Omitted]

COMPLAINT
Jury Trial Demanded

Filed Dec. 6, 1984

Plaintiff, John S. Lytle, complaining of the Defendant alleges as follows:

PARTIES, CAPACITY, JURISDICTION AND VENUE

1. Plaintiff, John S. Lytle, is an adult citizen of North Carolina and resides in Asheville, Buncombe County, North Carolina.

2. Defendant, Household Manufacturing, Inc. (hereinafter "Household") is a Delaware corporation having a principal place of business in Prospect Heights,

Illinois, domesticated in North Carolina and doing business in Asheville, North Carolina under the name of Schwitzer Turbochargers.

3. Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. §1331 and 1343 and Title 42 U.S.C. §1981 and §2000e-5(f)(3).

4. This action seeks to redress the deprivation of civil rights and employment discrimination which resulted from acts which are prohibited under Title 42 U.S.C. §1981(3) and §2000e-2(a).

FACTS

5. Plaintiff, who is a black male, was hired by Defendant Household on January 5, 1981 as a machinist for Household's Schwitzer Turbochargers plant in Asheville, North Carolina.

6. In this capacity, the Plaintiff through his experience and skill was assigned to operate one of the

most complicated and physically demanding machines used in the manufacturing process of Schwitzer Turbochargers.

7. From January 5, 1981, the date of his hire, to August 11, 1983, Plaintiff was a dependable and productive employee for Household and had not committed any serious or repeated violations of any company rule or regulation.

8. In March, 1983, Plaintiff began taking courses at Asheville-Buncombe Technical College in an effort to obtain a degree in mechanical engineering which would enhance his job skills and his opportunity for promotion within Household. The class for these courses met during the evening hours after the normal work hours of the Plaintiff.

9. Throughout his employment by the Defendant Household, Plaintiff was aware that

Household hired and promoted white employees on a continuing basis into job positions for which Plaintiff was qualified but was never considered.

10. On Thursday, August 11, 1983, Plaintiff told his immediate supervisor, Lawrence Miller, that Plaintiff desired to be absent from work on Friday, August 12, 1983 so that he could see a doctor.

11. Lawrence Miller responded by telling the Plaintiff that he could take Friday as a vacation day, but that Plaintiff would have to work overtime hours which were scheduled on Saturday, August 13, 1983.

12. Plaintiff informed Lawrence Miller that he would be unable to work on Saturday, August 13, 1983, because he was physically exhausted and unfit to work any more that week.

13. Plaintiff completed his production requirement for August 11, 1983 and left Defendant

Household's facility believing that he had informed Lawrence Miller of his situation and had been granted an excused absence for the next few days.

14. On Monday, August 15, 1983, Plaintiff returned to work and had nearly completed his shift when he was called into the office of Al Duquenne, Employee Relations Manager and was informed that he was being discharged for failing to come to work on Friday, August 12, 1983 and Saturday, August 13, 1983.

15. Upon information and belief, there are white persons employed by Defendant Household in the Schwitzer Turbochargers plant in Asheville, North Carolina who have as many or more instances of unexcused absences as does the Plaintiff or who have committed more serious violations of the company's rules and regulations and who have not been discharged upon the initial offense as was the Plaintiff.

16. Upon information and belief, Lawrence Miller, Al Duquenne, and Lane Simpson, Defendant's Personnel Managers, met, conferred and agreed to terminate the employment of Plaintiff because of his race.

17. On August 23, 1983, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission in which he alleged that the Defendant had terminated his employment because of his race and has discriminated against Plaintiff and other blacks with respect to hiring, promotion, discharge, references, seniority, and terms and conditions of employment. A copy of this charge no. 045831543 is attached hereto as Exhibit A and is incorporated herein by reference.

18. On September 28, 1984, the Equal Employment Opportunity Commission issued a "Notice of

Right to Sue" at the request of Plaintiff. A copy of this Notice of Right to Sue is attached hereto as Exhibit B and is incorporated herein by reference. All procedural prerequisites for filing this law suit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., have been met.

19. After his termination on August 15, 1983, Plaintiff sought comparable employment with other companies. Prospective employers who sought information pertaining to the job performance of Plaintiff from Defendant were denied this information. Defendant's officials and managers refused to provide this information in retaliation against Plaintiff for having filed a charge of discrimination with the Equal Employment Opportunity Commission.

20. As the result of the refusal of Defendant to provide information to prospective employers with

respect to his employment by Defendant, Plaintiff has been unable to obtain full time employment.

FIRST CLAIM FOR RELIEF

21. The acts of the Defendant have had and continue to have the effect of depriving Plaintiff of rights, privileges and immunities guaranteed to him by the Constitution and laws of the United States, and particularly his right to seek and obtain gainful employment, his right to be free from race discrimination with respect to the terms and conditions of his employment, including promotion and termination, and his right to petition the government to redress acts declared unlawful by Title VII of the Civil Rights Act of 1964.

22. The acts of Defendant have deprived Plaintiff from obtaining compensation which he would have earned but for the discriminatory acts of Defendant in an

amount which will be proven at trial to be at least $30,000.

23. The acts of Defendant were done wrongfully and maliciously, with bad motive and ill will toward Plaintiff, and with reckless disregard to the rights of Plaintiff. Plaintiff is therefore entitled to punitive damages in an amount in excess of $10,000.00.

SECOND CLAIM FOR RELIEF

24. The acts of Defendant, as alleged in the foregoing paragraphs, are in violation of the Equal Employment Opportunity Act, also known as Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.

25. Said acts have deprived the Plaintiff of the opportunity to obtain compensation which he would have

earned but for the discriminatory acts of Defendant in an amount which will be proven at trial.

WHEREFORE, Plaintiff prays that:

1. He recover judgment for all damages suffered by him as a result of the acts of Defendant described herein;

2. He recover punitive damages in an amount in excess of $10,000.00;

3. An order be issued immediately reinstating Plaintiff to his former job or to a job position which Plaintiff would have held but for the discriminatory acts of Defendant;

4. An order be issued enjoining Defendant, its agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing or maintaining any policy or practice which discriminates against Plaintiff because of his race or

retaliates against Plaintiff for having opposed practices declared unlawful by Title VII of the Civil Rights Act of 1964;

5. Plaintiff recover his reasonable attorneys' fees;

6. Plaintiff recover his costs in this action; and

7. Plaintiff recover such further relief as the Court deems appropriate.

PLAINTIFF REQUESTS A JURY TRIAL OF ALL ISSUES TRIABLE HEREIN BY A JURY.

This the 6th day of December, 1984.

JAMES, McELROY & DIEHL, P.A.

(sgd.) Regan A. Miller

By:_____

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Attorneys for Plaintiff

VERIFICATION

[Omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

[Caption Omitted]

AMENDMENT TO COMPLAINT
Filed Dec. 26, 1984

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiff, John S. Lytle, amends as a matter of right the Complaint filed in this action on December 6, 1984. Plaintiff amends the Complaint by adding a Third Claim for Relief which reads as follows:

THIRD CLAIM FOR RELIEF

26. Plaintiff repeats and realleges Paragraphs 1 through 25 of the Complaint as if more fully set forth herein.

27. As the result of the acts of Defendant as set forth herein, Plaintiff has suffered embarrassment,

damage to his reputation, emotional distress and mental suffering.

28. As the result of the foregoing, Plaintiff has sustained damages of at least $50,000.

Plaintiff also amends the Complaint by adding a paragraph 8 to the Prayer For Relief which reads as follows:

WHEREFORE, Plaintiff prays that:

8. He recover damages for emotional and mental suffering in the sum of at least $50,000.

Submitted this 26th day of December, 1984.

JAMES, McELROY & DIEHL, P.A.

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

[Caption omitted]

ANSWER
Filed Jan. 4, 1985

Defendant Household Manufacturing, Inc., answers as follows:

FOR A FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

FOR A SECOND DEFENSE

2. Defendant admits paragraph 1 of the complaint.

3. Defendant admits paragraph 2 of the complaint.

4. Defendant admits paragraph 3 of the complaint.

5. Defendant denies paragraph 4 of the complaint.

6. Defendant admits paragraph 5 of the complaint.

7. Defendant admits paragraph 6 of the complaint.

8. Defendant denies paragraph 7 of the complaint.

9. Defendant lacks sufficient information to admit or deny paragraph 8 of the complaint.

10. Defendant denies paragraph 9 of the complaint.

11. Defendant denies paragraph 10 of the complaint.

12. Defendant denies paragraph 11 of the complaint.

13. Defendant denies paragraph 12 of the complaint.

14. Defendant denies paragraph 13 of the complaint.

15. Defendant denies paragraph 14 of the complaint.

16. Defendant denies paragraph 15 of the complaint.

17. Defendant denies paragraph 16 of the complaint.

18. Defendant admits so much of paragraph 17 of the complaint as alleges that plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on August 23, 1983, Charge No. 045831543, and that said charge is attached to the complaint as

Exhibit A. Defendant denies the remainder of paragraph 17.

19. Defendant admits so much of paragraph 18 of the complaint as alleges that a Notice of Right to Sue was issued by the Equal Employment Opportunity Commission on September 28, 1984, and that a copy of this Notice of Right to Sue is attached to the complaint. Defendant denies that all procedural prerequisites for filing this lawsuit have been met.

20. Defendant denies paragraph 19 of the complaint.

21. Defendant denies paragraph 20 of the complaint.

22. Defendant denies paragraph 21 of the complaint.

23. Defendant denies paragraph 22 of the complaint.

24. Defendant denies paragraph 23 of the complaint.

25. Defendant denies paragraph 24 of the complaint.

26. Defendant denies paragraph 25 of the complaint.

27. Defendant denies that plaintiff is entitled to the relief requested in paragraphs 1-7 of the prayer for relief or to any relief whatever in this case.

FOR A THIRD DEFENSE

28. Insofar as the plaintiff seeks to state a cause of action for retaliation in violation of Section 704 of the Civil Rights Act of 1964, the procedural prerequisites for bringing such an action have not been met.

FOR A FOURTH DEFENSE

29. Plaintiff has unsuccessfully litigated the issue of race discrimination in his discharge before the

Superior Court of North Carolina in Lytle v. Schwitzer Turbochargers and the Employment Security Commission of North Carolina, 84-CVS-1602 (September 10, 1984) and is, by virtue of that decision, precluded by the doctrines of collateral estoppel and/or res judicata from relitigating that issue in this case.

Dated this 2nd day of January, 1985.

Respectfully submitted,

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SMOAK AND STEWART

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
ASHEVILLE DIVISION

[Caption omitted]

AMENDED ANSWER
Filed Jan. 9, 1985

Defendant Household Manufacturing, Inc., answers as follows:

FOR A FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

FOR A SECOND DEFENSE

2. Defendant admits paragraph 1 of the complaint.

3. Defendant admits paragraph 2 of the complaint.

4. Defendant admits paragraph 3 of the complaint.

5. Defendant denies paragraph 4 of the complaint.

6. Defendant admits paragraph 5 of the complaint.

7. Defendant admits paragraph 6 of the complaint.

8. Defendant denies paragraph 7 of the complaint.

9. Defendant lacks sufficient information to admit or deny paragraph 8 of the complaint.

10. Defendant denies paragraph 9 of the complaint.

11. Defendant denies paragraph 10 of the complaint.

12. Defendant denies paragraph 11 of the complaint.

13. Defendant denies paragraph 12 of the complaint.

14. Defendant denies paragraph 13 of the complaint.

15. Defendant denies paragraph 14 of the complaint.

16. Defendant denies paragraph 15 of the complaint.

17. Defendant denies paragraph 16 of the complaint.

18. Defendant admits so much of paragraph 17 of the complaint as alleges that plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on August 23, 1983, Charge No. 045831543, and that said charge is attached to the complaint as Exhibit A. Defendant denies the remainder of paragraph 17.

19. Defendant admits so much of paragraph 18 of the complaint as alleges that a Notice of Right to Sue was issued by the Equal Employment Opportunity Commission on September 28, 1984, and that a copy of this Notice of Right to Sue is attached to the complaint. Defendant denies that all procedural prerequisites for filing this lawsuit have been met.

20. Defendant denies paragraph 19 of the complaint.

21. Defendant denies paragraph 20 of the complaint.

22. Defendant denies paragraph 21 of the complaint.

23. Defendant denies paragraph 22 of the complaint.

24. Defendant denies paragraph 23 of the complaint.

25. Defendant denies paragraph 24 of the complaint.

26. Defendant denies paragraph 25 of the complaint.

27. Defendant denies paragraph 26 of the complaint.

28. Defendant denies paragraph 27 of the complaint.

29. Defendant denies paragraph 28 of the complaint.

30. Defendant denies that plaintiff is entitled to the relief requested in paragraphs 1-8 of the prayer for relief or to any relief whatever in this case.

FOR A THIRD DEFENSE

31. Insofar as the plaintiff seeks to state a cause of action for retaliation in violation of Section 704 of the

Civil Rights Act of 1964, the procedural prerequisites for bringing such an action have not been met.

FOR A FOURTH DEFENSE

32. Plaintiff has unsuccessfully litigated the issue of race discrimination in his discharge before the Superior Court of North Carolina in Lytle v. Schwitzer Turbochargers and the Employment Security Commission of North Carolina, 84-CVS-1602 (September 10, 1984) and is, by virtue of that decision, precluded by the doctrines of collateral estoppel and/or res judicata from relitigating that issue in this case.

Dated this 7th day of January, 1985.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

[Caption omitted]

SECOND AMENDED ANSWER
Filed Jan. 30, 1985

Defendant Household Manufacturing, Inc., answers as follows:

FOR A FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

FOR A SECOND DEFENSE

2. Defendant admits paragraph 1 of the complaint.

3. Defendant admits paragraph 2 of the complaint.

4. Defendant admits paragraph 3 of the complaint.

5. Defendant denies paragraph 4 of the complaint.

6. Defendant admits paragraph 5 of the complaint.

7. Defendant admits paragraph 6 of the complaint.

8. Defendant denies paragraph 7 of the complaint.

9. Defendant lacks sufficient information to admit or deny paragraph 8 of the complaint.

10. Defendant denies paragraph 9 of the complaint.

11. Defendant denies paragraph 10 of the complaint.

12. Defendant denies paragraph 11 of the complaint.

13. Defendant denies paragraph 12 of the complaint.

14. Defendant denies paragraph 13 of the complaint.

15. Defendant denies paragraph 14 of the complaint.

16. Defendant denies paragraph 15 of the complaint.

17. Defendant denies paragraph 16 of the complaint.

18. Defendant admits so much of paragraph 17 of the complaint as alleges that plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on August 23, 1983, Charge No. 045831543, and that said charge is attached to the complaint as

Exhibit A. Defendant denies the remainder of paragraph 17.

19. Defendant admits so much of paragraph 18 of the complaint as alleges that a Notice of Right to Sue was issued by the Equal Employment Opportunity Commission on September 28, 1984, and that a copy of this Notice of Right to Sue is attached to the complaint. Defendant denies that all procedural prerequisites for filing this lawsuit have been met.

20. Defendant denies paragraph 19 of the complaint.

21. Defendant denies paragraph 20 of the complaint.

22. Defendant denies paragraph 21 of the complaint.

23. Defendant denies paragraph 22 of the complaint.

24. Defendant denies paragraph 23 of the complaint.

25. Defendant denies paragraph 24 of the complaint.

26. Defendant denies paragraph 25 of the complaint.

27. Defendant denies paragraph of 26 of the complaint.

28. Defendant denies paragraph 27 of the complaint.

29. Defendant denies paragraph 28 of the complaint.

30. Defendant denies that plaintiff is entitled to

the relief requested in paragraphs 1-8 of the prayer for relief or to any relief whatever in this case.

FOR A THIRD DEFENSE

31. Insofar as the plaintiff seeks to state a cause of action of retaliation in violation of Section 704 of the Civil Rights Act of 1964, the procedural prerequisites for bringing such an action have not been met.

FOR A FOURTH DEFENSE

32. Plaintiff has unsuccessfully litigated the issue of race discrimination in his discharge before the Superior Court of North Carolina in Lytle v. Schwitzer Turbochargers and the Employment Security Commission of North Carolina, 84-CVS-1602 (September 10, 1984) and is, by virtue of that decision, precluded by the

doctrines of collateral estoppel and/or res judicata from relitigating that issue in this case.

FOR A FIFTH DEFENSE

33. Insofar as plaintiff seeks to state a pendent claim for intentional infliction of emotional distress resulting from his termination, plaintiff's sole and exclusive remedy lies under the North Carolina Workers' Compensation Act.

Dated this 28th day of January, 1985.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

[Caption omitted]

SUPPLEMENTAL COMPLAINT
Filed Nov. 27, 1984

Plaintiff supplements the Complaint in this action by adding a Fourth Claim for Relief which reads as follows:

FOURTH CLAIM FOR RELIEF

29. On December 4, 1984, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission in which he alleged that Defendant retaliated against him for filing a charge of discrimination by failing to provide prospective employers with information concerning his work history as an employee of Schwitzer Turbocharger. A copy of this

charge of discrimination is attached hereto as Exhibit C and is incorporated herein by reference.

30. On July 22, 1985, the Equal Employment Opportunity Commission issued a Notice of Right to Sue which was received by Plaintiff on or about July 26, 1985. A copy of this Notice of Right to Sue is attached hereto as Exhibit D and is incorporated herein by reference.

31. The Plaintiff has met all of the procedural prerequisites for bringing an action for retaliation pursuant to Title VII of the Civil Rights Act of 1964, as amended.

32. The acts of Defendant, as alleged in paragraph 19 and 20 of the Complaint, violated §704(a), 42 U.S.C. §2000(e)-3(a), of the Civil Rights Act of 1964. These acts deprived plaintiff of the opportunity of

obtaining employment with prospective employers and earning corresponding wages and benefits.

This the 30th day of September, 1985.

(sgd.) Regan A. Miller

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

[Caption omitted]

ANSWER TO
SUPPLEMENTAL COMPLAINT
Filed Nov. 27, 1985

Defendant hereby answers the plaintiff's supplemental complaint as follows:

34. The responses submitted in defendant's answer, amended answer and second amended answer are incorporated by reference as if fully set forth herein.

35. Defendant admits so much of paragraph 29 of the supplemental complaint as alleges that plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on December 4, 1984, Charge No. 045850225, and that said charge is attached to the supplemental complaint as Exhibit C. Defendant denies the remainder of paragraph 29.

36. Defendant admits so much of paragraph 30 of the supplemental complaint as alleges that a Notice of Right to Sue was issued by the Equal Employment Opportunity Commission, but is without information or belief as to the date such Notice was received by plaintiff. Defendant admits that a copy of the Notice is attached to the supplemental complaint as Exhibit D.

36. Defendant denies the allegations in paragraph 31 of the supplemental complaint.

37. Defendant denies the allegations in paragraph 32 of the supplemental complaint.

38. To the extent that plaintiff seeks to state a claim under 42 U.S.C. §1981 for alleged discriminatory acts which are subject to Title VII, said claims must be dismissed unless there is an independent factual basis for the §1981 allegation(s).

39. Defendant denies all allegations in the complaint, amendment to the complaint and supplemental complaint not specifically admitted in defendant's answer, amended answer, second amended answer or the answer to the supplemental complaint.

Dated this 26th day of November, 1985.

Respectfully submitted,
OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART

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DISTRICT COURT DECISION FROM THE BENCH
EXCERPTS FROM TRIAL TRANSCRIPT OF FEBRUARY 26-27, 1986

[Tr. 2-10:]

* * * *

THE COURT: This is the case of John S. Lytle versus Household Manufacturing, Inc., d/b/a Schwitzer Turbochargers. The first question the Court has is is this a jury case or a nonjury case?

MR. MILLER: Your Honor, this is a jury case. As we stated in our brief, both the retaliation issue and the discharge issue are cognizable under Section 1981, and we have cited cases in our brief, the Goff case, specifically with respect to the issue of retaliation, and the Johnson v. Railway Express case with respect to the Supreme Court decision saying that the remedies offered by Section 1981 simply augment the remedies offered by

Title VII and do not preclude bringing a case under 1981 and having a jury trial on those issues.

THE COURT: I see authority from some other circuits that says when you assert that one of the underlying facts are precisely the same as Title VII, 1981 claim, but the Title VII claim, which encompasses the 1981 claim, and that, therefore, it's the only remedy, and it's decided by the court without a jury. Do you have some Fourth Circuit authority on that subject?

MR. MILLER: Your Honor, I read that case. That's the Tafoya case I think you're talking about, when the judge out -- an honorable judge out in Colorado. I read that decision and, Your Honor, quite frankly, it goes against the Supreme Court's decision in Johnson v. Railway Express. That decision says that an individual has a cause of action for an employment discrimination under Section 1981 and can recover for that

discrimination damages, including compensatory damages, and punitive damages. You can't state a new claim for relief if it's employment discrimination, and clearly the Supreme Court was recognizing that employment discrimination claims are recognizable under 1981, as well as under Title VII, had said nothing about one precluding the other, and that's what essentially the Tafoya decision does. It says that if you allege that you lost your job because of race discrimination and that's it, and you file a Title VII claim, then Title VII preempts your remedies for an employment discrimination. Clearly the Supreme Court has said it does not. And, you know, I don't see how you can state a new grounds if it's employment discrimination. There's only one grounds: employment discrimination, race discrimination.

And I read that decision with interest, and it was pointed out to the judge that he was overturning some of

his prior decisions on the same issue in other cases where he had allowed a jury trial in a 1981 action which was appended to a Title VII action, and he simply says that, oh, I wasn't deciding the issues of whether one preempts the other. And he stated language from the Congressional Record which says that the relief and remedies offered by the Civil Rights statutes that were already on the books are not overturned or preempted by the new Title VII remedies and the procedure allowed under that.

In this particular case, you have that concern of whether or not Title VII, you should go through those administrative procedures and give the employer a chance to conciliate. Well, we did that, and we still brought both actions after the conciliation process ended. I don't think that there's any concern in this case as to

whether or not those administrative prerequisites have been followed.

So all I can say, Judge, is I can't figure out how you can allege a new cause of action or a new ground or separate grounds for employment discrimination when that's clearly the operative fact and distinguish that from the Title VII action. It's just not possible to do that. Additionally, what he seems to be saying is don't bring a Title VII action, just bring it under 1981, and then you don't have that problem. And if that's the case, then let's dismiss the Title VII action and go to the jury on the 1981 action.

THE COURT: As I recall the, at least, the popular reports of the legislative history at the time of this action, Title VII, it's the proponents of Title VII who would be opponents of jury trials in these cases, and the management forces are those who are saying it ought be

retained as a jury trial. You seem to have come full circle in this case.

MR. MILLER: We sure have, Your Honor. And I think the reason for that, Judge, is that there is a desire to provide -- by the Supreme Court to provide an employment discrimination victim with the remedies that are offered by the Civil Rights Statute of 1866 and to preserve those remedies.

There is clear indication in the Congressional Record that they didn't intend to overturn those remedies or make them obsolete.

THE COURT: What says the defense to this particular point?

MR. DENNARD: Your Honor, we, of course, raised this issue in our initial brief of issues in our trial brief. We would at this time move to dismiss the Section 1981 claim from the case. Because it alleges an alleged

violation of Section 1981, it can't be combined with a factually identical claim drawn under Title VII. This was, of course, the decision that was remedied by Tafoya. That Tafoya decision cited the Fifth Circuit decision as well as the Sixth Circuit decision and five separate district court decisions.

In addition, we placed two additional cases in your bench book that deal with the same questions, the Ramirez decision that's out of the Southern District of Texas, and this is what that court in this case says: Remedies for employment discrimination under 1981 are considered only if the plaintiff asserts claims on grounds different from those underlying the Title VII claims. And they -- he's -- the district court cites the Parson case, which is a Fifth Circuit case, and apparently the proposition so well settled in the Fifth Circuit, that in the Parson case they handled it in a footnote, and this is

what the footnote says: Remedies for employment discrimination under 42 U.S.C. 1981 are considered only if the plaintiffs assert claims on grounds different from those underlying the Title VII claims. And in this case, we have there's no separate claim. We have simply the same claims involved and simply two statutes set out in the Complaint.

THE COURT: What do you say to the Johnson decision?

MR. DENNARD: Well, the Johnson -- the way Tafoya handled that is that the Johnson does not negate that requirement. Johnson says there's a remedy for employment discrimination, specifically race discrimination, and in that case, in that situation, you would have a right to a jury trial. But it doesn't negate this requirement that the plaintiff establish an independent basis for the claim. That's what Tafoya says

in those four. And, of course, you know, they cited pretty good authority. I don't think we've been cited any authority at all contrary to that, other than just going back and seeing what Johnson itself says. Mr. Miller dealt with this in his supplemental brief, and I don't think he cited any authorities that were contrary to that.

THE COURT: Where in the Tafoya decision is Johnson dealt with?

MR. DENNARD: In footnote 4 it says, the quote that I have down is that Johnson does not negate the requirement that plaintiff establish an independent basis for his claim.

* * * *

MR. DENNARD: I don't think Johnson has anything to do with combining them both in one action and deciding that it's proper to do that even if there's no independent basis for the 1981 claim.

MR. MILLER: Well, Your Honor, if my recollection of the Johnson case is correct, that was exactly what was going on in that case. The individual had sued under 1981, and as I remember it, had failed to comply with the administrative prerequisites for a Title VII action. And the decision was whether or not he had to comply with the Title VII prerequisites before he could go into federal court under 1981, or whether he had to comply with Title VII, and that was it, and if he didn't, his action was dismissed. And the court said no, it's not dismissed. 1981 is a separate remedy, and if he files under 1981 for employment discrimination he has a cause of action.

MR. DENNARD: If that is true, Your Honor, we've got a lot -- two circuits and a lot of district court cases that are just plain out wrong.

THE COURT: It would appear from a very cursory reading of Johnson that the Title VII action was never filed as a lawsuit in that case, though he did make his commission approach, and more than two years later filed a lawsuit under 1981.

MR. MILLER: Right. And he couldn't file under Title VII because of the statutory filing limitations law.

THE COURT: I will find from the pleadings in this cause that there is no independent basis alleged in the 1981 action. I will conclude, based upon the reasoning of the Tafoya case, that Title VII provides exclusive remedy, and this case will be tried by the Court

without a jury, and the 1981 claim is dismissed. Your exception is noted for the record.

* * * *

MR. MILLER: Can I just ask a question?

THE COURT: Yes, sir.

MR. MILLER: Are you saying that an employment descrimination [sic] victim has no right to compensatory and punitive damages?

THE COURT: I am saying that in this case the Title VII remedy is exclusive remedy, since there is no independent basis for the 1981 action.

MR. MILLER: And let me ask the Court, how would you go about alleging a independent basis of his employment discrimination and that's it?

THE COURT: Well, counsel --

MR. MILLER: Additionally, Your Honor --

THE COURT: -- I have ruled that the 1981 case is dismissed.

* * * *

MR. MILLER: Was that both issues? That's all I wanted to know. Retaliation and --

THE COURT: Retaliation is also a claim remedial -- remedied under Title VII, so I think it would apply to both issues.

* * * *

[Tr. 258-259:] [THE COURT:] As to the discharge claim, I will make the following findings:

That the defendant is an employer who employed -- I don't recall the exact number of people, but I will make a finding that they employed a number of people for a number of hours in excess of the threshold set out with reference to Title VII cases;

I will further find that John S. Lytle was an employee of the defendant during the relevant period;

I will find that he is Black;

I will find that the company did have the attendance policy as set out in Exhibit 22, in the paragraphs headed "Excessive Absence" with the subheading "Excused Absence, Tardy, or Leaving Early," and "Unexcused Absence, Tardy, or Leaving Early;"

I will find that plaintiff has shown evidence of four white employees who violated the excused absence policy and were given warnings, and of one white employee who had six minutes, approximately six minutes of excessive unexcused absence, tardiness, or leaving early, and that he was given a warning;

I will find by plaintiff's own evidence plaintiff had excess unexcused absence of 9.8 hours, and that, with

reference to this unexcused absence, he did not follow the company policy of calling in;

I will find that the conduct on the part of the white employees is not substantially similar in seriousness to the conduct for which plaintiff was discharged.

I will conclude as a matter of law that the Court has jurisdiction of this matter, and that the plaintiff has established that he is a member of a protected category, and that he was discharged for violation of the company's policy, but I will conclude as a matter of law that he has not established a prima facie case, since he has not established that Blacks were treated differently, and in fact committed violations of the company's policy of sufficient seriousness;

And I will order that the claim as to the discharge be dismissed.

Again, I will deny the motion as to the claim of retaliation.

* * * *

[Tr. 299-301] THE COURT: Let me ask you this, counsel.

If the policy -- if the usual practice is to give letters, rather than just give the bare bones information, and he is being discriminated against because of retaliation, wouldn't it be the rule, rather than you just having one letter, that letters would have been issued in the past?

MR. MILLER: Well, Your Honor, I think that's evidence -- this is evidence that that's not the rule.

THE COURT: It would seem to me that the evidence here is not that Mr. Lytle was treated disparately, but rather that Joe Carpenter was treated disparately favorably.

MR. MILLER: Well, if you believe what they -

THE COURT: I don't --

MR. MILLER: -- say, Your Honor. If you believe that's what they say, Your Honor, then -- then -- then that's what it is, but, Your Honor --

THE COURT: Well, the only --

MR. MILLER: -- they state what the policy is, and then we've got a letter here which doesn't comply with the policy, which we say that wasn't the policy. The policy -- it's not written anywhere, Your Honor.

THE COURT: The only evidence to the contrary, or the evidence that that's the policy is one letter. And that doesn't make Mr. Lytle's treatment disparate; it makes Mr. Carpenter's treatment disparate, and I will at the close of all the evidence reaffirm my prior findings of fact, add the additional finding of fact that Mr. John S. Lytle did file the charge of

discrimination against Schwitzer Turbochargers with the EEOC on or about August 23, 1983;

The further finding of fact that when asked for references from prospective employes [sic], the defendant provided only the dates of employment and job title and, if requested, a description;

Further find as fact that that was the policy of the defendant;

Further find as fact that that was based upon the defendant's corporate understanding of it's legal right and to protect it from obligations that might be incurred by the release of negative information;

Further find as fact that defendant corporation, acting through Lane Simpson, did on one occasion grant a favorable reference letter to one terminated employee;

Further find as fact that the granting of that one favorable reference letter was done through inadvertence;

Further find as fact that there is no evidence of discrimination against John S. Lytle based upon his having made complaint to EEOC.

Conclude as a matter of law that there is no foundation in law for the retaliation claim. Add the conclusion of law that I made in the first conclusion, that I have jurisdiction of this action, and I will enter a judgment in favor of the defendant on all claims.

* * * *

No. 88-234 (4)

FILED
SEP 1 1988
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN S. LYTLE

Petitioner,

v.

HOUSEHOLD MANUFACTURING, INC.,
D/B/A SCHWITZER TURBOCHARGERS,

Respondent.

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the Fourth Circuit err in holding violations of the Seventh Amendment unreviewable on direct appeal when the district court compounds the violation by deciding itself the questions that should have been presented to the jury?

LIST OF PARTIES

The respondent, Household Manufacturing, Inc., is a wholly owned subsidiary of Household International, Inc. All other parties in this matter are set forth in the caption.

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Statutes, Constitutional Provisions and Rules

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is unpublished, and is set out in the Appendix to the petition for writ of certiorari ("App.") at pages 1a-21a. The order of the court of appeals denying rehearing, which is not reported, is set out at App. 22a-24a. The district judge's bench opinion, which is unreported, is set out at App. 25a-31a and in the Joint Appendix (JA) at pages 56-64. The order of the district court dismissing the case is set out at App. 34a-35a.

JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of the case was entered on October 20, 1987. App. 1a. A timely petition for

rehearing was denied on April 27, 1988. On July 19, 1988, Chief Justice Rehnquist entered an order extending the time for filing a petition for writ of certiorari to and including August 25, 1988. The petition for writ of certiorari was filed on August 23, 1988, and was granted on July 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISION, AND RULES INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 1981 of 42 U.S.C. provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2)(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . .

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 39 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or

> all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

This action involves claims of intentional racial discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5. Petitioner John S. Lytle, a black person, contends that he was fired by respondent on account of his race and that respondent then retaliated against him for pursuing his federal equal employment opportunity claims.

1. Background

Schwitzer Turbochargers, a subsidiary of respondent Household Manufacturing, Inc. [hereafter referred to as "Schwitzer"], makes turbochargers and fan drives at its Arden, North Carolina, plant. Tr. 13. In February 1982,

Schwitzer adopted an employee absence policy with the following salient features. First, workers must report all anticipated absences to their supervisors "as soon as possible in advance of the time lost, but not later than the end of the shift on the previous workday." PX 22, p. 1. Second, certain kinds of absences -- in particular, those involving personal illness, PX 22, p. 2 -- are characterized as "excused." Third, even though absence due to illness is excused, an "excessive" level of such absences -- defined as a "total absence level which exceed[s] 4% of the total available working hours, excluding overtime," id. at 2-3 -- "will, most likely, result in termination of employment." Id. at 3. Fourth, a worker also faces termination for excessive absence if he has "any unexcused absence which exceeds a total of 8 hours (or one scheduled work shift) within the preceding 12-month period." Id.

Petitioner is an experienced machine operator.[1] Tr. 84. In January 1981, he was hired by respondent as a machinist trainee at the Arden plant. Less experienced whites were hired directly into machine operator positions. Tr. 83-84, 87. Ultimately, petitioner achieved the highest graded machinist classification. Tr. 87-89. In his 1982 performance evaluation, he was commended for his good attendance record. Tr. 86; PX 6. Until the events that precipitated this lawsuit, he had never been reprimanded or disciplined for attendance problems. Tr. 86-87.

[1] This discussion of the events pertaining to petitioner's discharge claim is based primarily on Lytle's testimony at trial. The district court dismissed his discharge claim at the close of petitioner's evidence; hence, virtually all the record testimony on behalf of the respondent goes only to retaliation, not discharge.

2. Petitioner's Termination

In February 1983, petitioner embarked on a rigorous evening program studying mechanical engineering at Asheville-Biltmore Technical College. Tr. 90-95.[2] By the summer, he began to suffer health problems. The plant nurse recommended that he consult a doctor. Tr. 71-72, 121. In June or July, Lytle also informed his supervisor, Larry Miller, who was white, of his health problems and stated that for this reason he preferred not to work overtime. Tr. 120.

At the beginning of August 1983, Lytle cut back his school program to two evenings per week. Tr. 95. During the first week of August, Schwitzer machinists

[2] On class days, Lytle left work at 3:30 p.m., arrived home about 4:00 p.m., had something to eat, arrived at the college library to study at 4:30 or 5:00 p.m., and attended class from 6:30 p.m. until between 9:00 and 11:00 p.m. Tr. 92. He also frequently found it necessary to study in the late evening and early morning hours. Tr. 120.

were called upon to work a substantial amount of overtime in order to keep up with production requirements. Tr. 238.

The next week, Lytle's health problems worsened,[3] and he scheduled an appointment for Friday, August 12, 1983, with a doctor who had been recommended by the Schwitzer nurse. Tr. 122, 130-131. On Thursday morning, August 11, Lytle asked his supervisor for permission to schedule Friday, August 12, as a vacation day. Tr. 129-132.[4]

At the time, Miller approved petitioner's request. Tr. 130. However, later in the day, Miller told petitioner that "if you're off Friday, you have to work on Saturday,"

[3] On one occasion he became so dizzy that he fainted. Tr. 132.

[4] Although sick leave would have been granted for a doctor's appointment, Lytle preferred to have the absence treated as a vacation day. Tr. 194. Such treatment meant that the day would not be counted as an absence under Schwitzer's policy regarding "excessive absence." Tr. 208.

Tr. 131, which was not a normal work day for Lytle, Tr. 132. Lytle "explained that I wanted Friday off to see the doctor, and I wouldn't be able to work Saturday because I was physically unfit." Tr. 131-32. When Miller still insisted that Lytle work on Saturday, Lytle told him that he would also take Saturday as a vacation day. Tr. 132. Miller walked off, without objecting to this suggestion. Tr. 132. Lytle understood that Friday would be treated as a vacation day, and that he had sufficiently informed Miller that he was physically unable to work on Saturday. Tr. 191. Moreover, Lytle repeated his intentions to the

Human Resources Counselor, Judith Boone. Tr. 137-138.[5]

Lytle returned to work on Monday, August 15. After a meeting with Schwitzer's personnel manager and Miller, during which Lytle was asked to provide an explanation for his absence, Lytle was fired. Tr. 142-143. The apparent reason for the termination was for alleged excessive unexcused absences, primarily the Friday and Saturday shifts Lytle had missed as a result of his health problems.[6] JA 8; Tr. 220. Had petitioner's

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[5] Boone confirmed that Lytle had a conversation with her that day regarding problems with Miller; however, she testified that she did not recall any mention of vacation scheduling. Tr. 60-61.

[6] In addition to the two days in question, apparently Schwitzer treated Lytle's departure on Thursday, August 11, shortly after the normal end of his shift, as 1.8 hours of "unexcused absence," because he did not work two hours of overtime that may or may not have been scheduled. There was conflicting evidence concerning whether Lytle was in fact scheduled for overtime on Thursday and whether his purported failure to inform Miller that he had to leave was directly attributable to Miller's behavior toward Lytle. Tr. 135. In any event, the district judge found Lytle to have had 9.8 hours of unexcused absence. JA 59-60.

absences been properly classified either as vacation days or as excused absences, he would not have fallen within the terms of the excessive absence policy. Tr. 252-253. Moreover, Schwitzer's records showed that white employees were not terminated despite "excessive absence." Instead, these white workers were given warnings and an opportunity to improve.[7]

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[7] Donald Rancourt, a white machinist, received a written warning from Larry Miller concerning an absence rate of 7.5% in January, 1983. Tr. 217-18, 222, 230. Rancourt's April 1983 annual performance review mentioned an absence problem Tr. 48; PX 15-C, page 4. Rancourt was not terminated. Tr. 54.

As of March 2, 1984, Jeffrey C. Gregory, a white machinist, had an annual absence level of 6.3% of total available working hours. Tr. 57-58; PX 28-B. He was not terminated. Tr. 58. It is not clear whether he was even counselled concerning his excessive absenteeism. Tr. 58.

On July 13, 1983, approximately one month prior to Schwitzer's termination of Lytle, Rick Farnham, a white machine operator, was counselled for excessive absenteeism. Tr. 55-56; PX 12-B. At that time Farnham's annual absence rate was 4.3%. Tr. 56; PX 12-B. Farnham was not terminated.

On August 23, 1982, David Calloway, a white machinist, was given his second warning in three months about excessive absenteeism. In June, 1982, his absence percentage was 4.5%, and he was warned that "an immediate improvement must be made." PX 13-B, p. 1. In August, his absence percentage remained at 4.5% He had been absent for a total of 16.2 hours since the June warning, and two absences were on consecutive Mondays. Tr. 44. Instead of termination, Calloway was given an additional sixty days in which to

3. Respondent's Retaliation

On August 23, 1983, Lytle filed a charge of discrimination with the Equal Employment Opportunity Commission. Tr. 61; PX 1. This charge was received by Schwitzer's Human Resources Counselor, Judith Boone, who is white, shortly thereafter. Tr. 61-62.

At approximately the same time, Lytle began looking for another job in the Asheville area. Several prospective employers told him that they were having difficulty getting an adequate reference from Schwitzer. Tr. 111. Boone refused to return questionnaires from

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correct the problem. PX 13-B.

Finally, Greg Wilson, a white machinist, was absent two successive days without obtaining prior approval. Tr. 23-24. Of the sixteen hours of absence, eight were categorized as unexcused. The second day's absence was "excused" because Wilson called to inform his supervisor that he was ill. This two-day absence followed three unexcused tardies. Thus, as of March, 1983, Wilson had accumulated excessive unexcused absences. Tr. 67. Yet, Wilson was not fired, but merely counselled to improve his absence record. PX 14B.

two employers. Although Schwitzer claimed that it was merely applying its normal policy with respect to references for individuals who have been involuntarily terminated, Tr. 261, the company had in fact provided a favorable letter of reference for Joe Carpenter, a white male, the only other machinist involuntarily terminated prior to Lytle in 1983. See PX 10.

4. Proceedings in the District Court

Lytle filed a complaint in federal district court alleging that respondent had fired him because of his race and retaliated against him for filing a charge of discrimination with the Equal Employment Opportunity Commission, all in violation of both Title VII and Section 1981. JA 9-10. The notation "Jury Trial Demanded" appears on the first page of the complaint, JA 4, and at the end of the complaint was the following statement:

"Plaintiff requests a jury trial of all issues triable herein by a jury." JA 14. The relief requested involved backpay, damages for "emotional and mental suffering," punitive damages, and injunctive relief including reinstatement.

Respondent answered the complaint and ultimately moved for summary judgment on several grounds. On May 17, 1985, the district court denied the motion, finding that "there is a genuine issue as to material facts." Dkt. Nr. 19.

On the day of trial, the district court granted Schwitzer's motion to dismiss all claims under § 1981, holding that Title VII provides the exclusive remedy for employment discrimination. The dismissal of petitioner's § 1981 claims necessarily meant the striking of his jury

demand. JA 56-57.[8] The court then conducted a bench trial of petitioner's Title VII claims.

In essence, the trial revolved around four issues -- whether Lytle had in fact received permission from Miller not to work on Friday and Saturday, whether the decision to fire Lytle was based in whole or in part on impermissible racial motives, whether Schwitzer's absence policies had been applied to white workers who were similarly situated, and whether the refusal to provide a reference for Lytle involved retaliation for his having filed a Title VII charge. Resolution of each of these issues was critically dependent on the factfinder's assessment of the credibility of the witnesses and the plausibility of their conflicting stories.

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[8] The district court did not rule on the proposal made by Lytle's attorney that the court "dismiss the Title VII action and go to the jury on the 1981 action." Tr. 4. The district court also denied Lytle's motion for reconsideration of the § 1981 dismissal made on the second day of trial. JA 97-98.

At the close of petitioner's case, the court dismissed petitioner's Title VII discriminatory discharge claims, finding that he had failed to present a prima facie case. The district judge found that, while Lytle had demonstrated that one white employee, Greg Wilson, had exceeded the limit on unexcused absences and that at least four white employees who violated the excessive absence policy were only given warnings, the conduct of these employees was not "substantially similar in seriousness" to that of petitioner. Tr. 259; JA 59-60. This determination was based apparently on the judge's supposition that Schwitzer treated excused and unexcused absences differently, and that Wilson's infraction was de minimis. However, there was no evidence that the employer intended to treat the classes of absences differently as to the ultimate penalty that could be

imposed,[9] and the record was, by the trial judge's own recognition, unclear on the exact amount of Wilson's additional absences.[10]

Following the close of all the evidence, the judge ruled from the bench in favor of respondent on the

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[9] Indeed, the record contradicts such a conclusion in the several respects. First, Schwitzer's absence policy itself includes both excused and unexcused absences in the category for which termination will "most likely result," when the stated limits are exceeded. PX 22, p. 2. Second, the policy notes that termination of employment may result even before maximum limits are reached, where a pattern of absence, excused or unexcused, is observed. Id., p. 3. Finally, Schwitzer has already made a distinction between unexcused and excused absences by adopting a policy that permits excused absences to total at least 72 hours, assuming a year consisting of 48 weeks of 40 hours each, while tolerating only 8 hours of unexcused absences. Id.; Tr. 17 ("On the excused portion . . . , we have allowed more flexibility there."). The trial judge's addition of yet another layer of distinction, by finding that excessive excused absences are not "serious," in the face of a policy statement that "absence hurt us all" (PX 22, p. 3), suggests that the trial judge, was not acting merely as a factfinder, but was drawing a number of inferences from the evidence. Opposite inferences could have as easily been drawn. See, infra, Argument, Sec. I.B.

[10] The trial judge concluded that Wilson had exceeded the limit by only six minutes, based on his interpretation of the documents. Tr. 251-252. ("Frankly, the evidence wouldn't support this, but I think that decimal number . . . really means minutes rather than hundreths.") Cf. PX 14-B; Tr. 39, line 16-17; PX 14-C (indicating nine tardy incidents during the period of March 1983 through February 1984).

retaliation claim.[11] App. 26a-31a. The trial judge subsequently entered a judgment for defendant on all issues. App. 32a-35a.

5. Proceedings in the Court of Appeals

On appeal to the Fourth Circuit, petitioner argued, among other things, that the district court's erroneous dismissal of his § 1981 claim had denied him his Seventh Amendment right to a jury trial.

A majority of the Fourth Circuit panel acknowledged that the district court had erred in dismissing petitioner's § 1981 claim. App. 7a, n.2. But although the Court recognized that petitioner had been wrongfully denied the right to present his claims of intentional racial

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[11] The district judge found that the fact that Schwitzer had issued a favorable letter of recommendation for a white who was the only other employee whose employment had been involuntarily terminated was not sufficient; rather the judge found that instead of Lytle receiving disparate treatment, the white employee had simply been treated "disproportionately favorably." Tr. 203.

discrimination to a jury, it refused to correct this constitutional error. Instead, the appellate court followed Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1986), cert. denied, 108 S. Ct. (1987), and held that the findings made by the district judge during the bench trial of petitioner's Title VII claims collaterally estopped petitioner from litigating his § 1981 claim. App. 8a-9a. Notably, the Court of Appeals did not conclude that a jury would necessarily have reached the same factual conclusions as the district judge. Rather, it determined only that the district judge's findings of fact were "not clearly erroneous." App. 10a-13a.

Judge Widener, in a dissenting opinion, noted that the majority's view of collateral estoppel was inconsistent with a Seventh Circuit decision on "exactly this issue" in Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987), and that it was "not consistent with" the

recent decision of this Court in Tull v. United States, 95 L.Ed.2d 365 (1987). App. 19a. He concluded that if the appellate courts were powerless to correct the erroneous denial of a jury trial merely because the judge involved had issued a constitutionally tainted decision of his own on the merits, "the Seventh Amendment means less today than it did yesterday." Id. A timely petition for rehearing and suggestion for rehearing en banc were denied with Judges Widener, Russell and Murnaghan voting to rehear the case en banc. Id. at 22a-24a.

SUMMARY OF ARGUMENT

I. Throughout this nation's history the right to trial before a jury of one's peers has held a revered place in American jurisprudence. Hodges v. Easton, 120 U.S. 408 (1882). The jurisprudence of this Court has recognized that juries bring to their evaluation of the facts a perspective that is distinct from that of judges. Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657 (1874).

The Seventh Amendment preserved the right to a jury in actions at law and therefore those brought to enforce statutory rights. Curtis v. Loether, 415 U.S. 189 (1974). Thus, plaintiffs possess that right in actions brought under section 1981, provided that, as here, a proper demand has been made. Patterson v. McLean Credit Union, 105 L.Ed.2d 132 (1989). Where legal

and equitable claims are joined in the same action, this Court has held that the right to a jury trial on the legal claims is not lost, and the jury claims are to be tried first, absent compelling circumstances. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

II. When a district court flouts this rule, this Court has consistently reversed the judgment below and remanded for trial before a jury. This Court has never sanctioned appellate review that proceeds as if the error never happened. Granfinanciera S.A. v. Nordberg, 109 S.Ct. 2782 (1989); Tull v. United States, 481 U.S. 412 (1987); Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963).

The court of appeals fundamentally misapplied this Court's decision in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Parklane cannot be read, as did the

Fourth Circuit, to apply collateral estoppel to preclude review on direct appeal of a Seventh Amendment violation. Parklane applies by its terms, as do all principles of preclusion, to subsequent proceedings rather than to appellate review in a single proceeding. This Court has never held that a district court may accomplish by error what Beacon Theatres prohibits it from doing purposefully.

III. A rule that an appellate court may not review violations of the Seventh Amendment, so long as the district court's findings are not clearly erroneous, would fail to serve the interest in judicial repose fostered by the rules of preclusion. Instead, such a procedure would increase the burden on appellate courts by requiring parties to proceed by mandamus or take an interlocutory appeal, whenever their constitutional right to a jury has been violated. Lauro Lines S.R.L. v. Chasser, 109 S.Ct.

1976 (1989); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

ARGUMENT

I. THE DECISION BELOW DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE SEVENTH AMENDMENT

A. The District Court Erroneously Deprived Petitioner of His Right to a Jury Trial on His § 1981 Claims

The Court of Appeals correctly recognized that petitioner's complaint stated a claim under § 1981. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). In fact, the complaint raised two distinct violations of § 1981.[12] It alleged that respondent had fired petitioner on

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[12] In Patterson v. McLean Credit Union, 105 L.Ed.2d 132 (1989), this Court reaffirmed the application of § 1981 to private conduct and held that § 1981 covered the making and enforcing of employment contracts, although it did not cover racial harassment occurring after the formation of the contract.

account of race, and it alleged that respondent had retaliated against petitioner because petitioner had pursued his rights under Title VII.

Petitioner was entitled to a jury trial of his § 1981 claims.[13] As this Court noted in Curtis v. Loether, 415 U.S. 189 (1974), the "Seventh Amendment . . . appl[ies] to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law." Id. at 194.[14] Applying that principle, every court of appeals to have addressed the issue has recognized that the Seventh Amendment

[13] The fact that the district court denied respondent's summary judgment motion on petitioner's Title VII claims because it saw "a genuine issue as to material facts" regarding what in fact happened, JA 23, strongly substantiates the conclusion that, had the court not applied erroneous legal principles to petitioner's § 1981 claims, petitioner would have been entitled to present the facts underlying those claims at trial.

[14] See also, Patterson v. McLean Credit Union, 105 L.Ed.2d 132, 156 (1989) (addressing jury instruction issue).

applies to § 1981 actions when the jury demand has been properly preserved.[15] That conclusion is further buttressed by this Court's holding that cases under the Reconstruction Civil Rights Acts resemble traditional tort actions (which lie within the core of the Seventh Amendment), and thus that the state statutes of limitations to "borrow" in § 1981 cases are those used in tort cases. See, e.g., Hardin v. Straub, 109 S.Ct. 1998, 2000 (1989); Owens v. Okure, 109 S.Ct. 573 (1989); Goodman v. Lukens Steel Co., 107 S.Ct. 2617 (1987); Wilson v. Garcia, 471 U.S. 261 (1985).

It is undisputed in this case that Lytle made a timely request for a jury trial pursuant to Fed. R. Civ. P. 38,

[15] See, e.g., Moore v. Sun Oil Co., 636 F.2d 154 (6th Cir. 1980); North v. Madison Area Ass'n for Retarded Citizens, 844 F.2d 401 (7th Cir. 1988); Setser v. Novack, 638 F.2d 1137, 1147 (8th Cir. 1981); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir.), cert. denied, 459 U.S. 971 (1982) ; Skinner v. Total Petroleum, 859 F.2d 1439 (10th Cir. 1988); Lincoln v. Board of Regents, 697 F.2d 928, 935 (11th Cir. 1983).

and that he never waived that demand. In fact, he continued to object to the denial of his Seventh Amendment rights even after trial was underway. Thus, the district court erred by "substitut[ing] itself for the jury and, passing upon the effect of the evidence, find[ing] the facts involved in the issue and render[ing] judgment thereon." Baylis v. Travelers' Ins. Co., 113 U.S. 316, 321 (1885).

B. Petitioner Was Denied the Benefit of the Fundamental Values Protected by the Seventh Amendment Right to Trial by Jury

The Seventh Amendment provides in pertinent part that "[i]n suits at common law, where the value in controversy shall exceed $20, the right of the trial by jury shall be preserved . . . ." That entitlement holds a special, privileged position in American jurisprudence as a "basic and fundamental" right to be jealously guarded.

Jacob v. City of New York, 315 U.S. 752 (1942); Baylis v. Travelers' Ins. Co., supra; Hodges v. Easton, 106 U.S. (16 Otto) 408 (1882).

This Court has long recognized the critical function juries perform:

> [I]t is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts . . . . It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the more common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664-64 (1874). It is precisely because the system of

adjudication benefits so strongly from "the infusion of the earthy common sense of a jury," United States v. One 1976 Mercedes Benz 208 S, 618 F.2d 453, 469 (7th Cir. 1980), that the Court and Congress[16] have repeatedly insisted, in both civil and criminal cases, that juries be drawn from the widest possible section of the community. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975); Duncan v. Louisiana, 391 U.S. 145 (1968); Thiel v. Southern Pacific Co., 328 U.S. 217 (1945). As Chief Justice Rehnquist noted in his dissent in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 344 (1979), "juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the

16 28 U.S.C. § 1861 et seq. (Jury System Improvements Act of 1978).

community. O. Holmes, Collected Legal Papers 237 (1920)."

The right to litigate claims under § 1981 before a jury can be especially important. When a plaintiff's claim rests on the assertion that a facially neutral action was undertaken for invidious racial purposes, the factfinder's assessment will often depend on "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977). The factfinder will often be called upon to draw on his or her experience in the real world in assessing the plausibility of conflicting testimony,[17] and making inferential judgments.[18] The

17 Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891); Ellis v. Union Pac. R.R. Co., 329 U.S. 649, 653 (1947). See, also, Schnapper, Judges Against Juries -- Appellate Review of Federal Jury Verdicts, 1989 Wis.L.Rev. 237, 265-67.

18 Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 34-35 (1944) ("It is the jury, not the court, which . . . weighs the contradictory evidence and inferences . . . and draws the ultimate

perspectives of lay people, of different racial and ethnic backgrounds, both male and female, many of whom are likely to have had employment histories similar to a plaintiff, are bound often to result in juries reaching conclusions "that a judge either could not or would not reach." Parklane Hosiery Co. v. Shore, 439 U.S. at 344 (Rehnquist, J., dissenting). That a factual "dispute relates to an element of a prima facie case under McDonnell-Douglas . . . does not make it any less a matter for resolution by the jury." Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101 (8th Cir. 1988).

The instant case, involving straightforward claims but

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conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."); Standard Oil Co. v. Brown 218 U.S. 78, 86 (1910) ("[W]hat the facts were . . . and what conclusions were to be drawn from them were for the jury and cannot be reviewed here."); Hyde v. Booraem & Co., 41 U.S. (16 Pet.) 232, 236 (1842) ("We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury . . . ."). Schnapper, n. 17, at 277-83.

conflicting evidence, is precisely the sort of litigation where a judge and jury might well have reached diametrically opposite conclusions.[19] A jury of laypersons, who resided in North Carolina and who worked in a similar setting, might well have concluded, for example, that Lytle was justified in believing that he did not have to call in on Saturday, because both Friday and Saturday were excused.[20] Had Miller testified, a jury might well have decided that his treatment of Lytle was not free from racial motives, based on credibility determinations, inferences from the evidence that racial discrimination had entered into Lytle's hiring (supra, p.7),

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19 Lytle's testimony of the events is all that was before the district, since the trial judge's Rule 41(b) dismissal truncated the proof. While it may be presumed that Miller would have disputed some of this testimony, he has never testified as to his version of the events of August 11, 1983.

20 The trial judge agreed that such a conclusion would be a "reasonable interpretation of the evidence." Tr. 252-53. Moreover, the district court found that at least one of the days in question was excused. See n. 6, supra.

or the fact that white employees were treated differently. Similarly, with regard to Lytle's claim of retaliation, a jury might well have concluded, not that the glowing letter of reference for Carpenter was inadvertent[21] but, that no such reference was given to Lytle because he had taken action to redress an alleged violation of his federally granted rights.

II. THE DENIAL OF SEVENTH AMENDMENT RIGHTS IS SUBJECT TO REVERSAL PER SE ON DIRECT APPEAL

A. This Court Has Always Treated Seventh Amendment Violations as Reversible Per Se

This Court has long recognized that "the claims of the citizen on the protection of this court [and, since the

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21 Joe Carpenter was fired for falsification of timesheets. Tr. 214-25. Carpenter, a white machinist who was the only Schwitzer employee other than Lytle fired in 1983, PX 19. Thus, although Lane Simpson, Schwitzer's manager of human resources testified on direct examination that he confused Carpenter with somebody else, a jury might have rejected this assertion based on that fact as well as on statements he made during cross examination. See, Tr. 271-274.

development of the courts of appeals, on those courts as well] are particularly strong" when a litigant has been denied his Seventh Amendment rights. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 240 (1819). Thus, the Court has repeatedly and consistently redressed Seventh Amendment violations by directing that the issues improperly heard by a judge be retried before a jury. This Court has never excused the Seventh Amendment violation by holding that the judge's intervening factual findings pretermit presentation of a litigant's case to a jury. See, e.g., Pernell v. Southall Realty, 416 U.S. 263 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963); Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932); Scott v. Neely, 140 U.S. 358, 360 (1891); Buzard v. Houston, 119 U.S. 451, 454 (1886); Baylis v. Travelers' Insurance Co., 113 U.S. 316 (1885); Killian v.

Ebbinghaus, 110 U.S. 246, 248-249 (1884); Webster v. Reid, 52 U.S. 437 (1850); Lewis v. Cocks, 90 U.S. 70, 71 (1874); Hodges v. Easton, 106 U.S. 408 (1882).[22]

As recently as last Term, this Court once again applied this longstanding rule. In Granfinanciera S.A. v. Nordberg, 109 S.Ct. 2782 (1989), the bankruptcy court denied the petitioners' request for a trial by jury, conducted a bench trial, and entered findings and a judgment against the petitioners. Id. at 2787. The district court and court of appeals affirmed the

22 Other than the Fourth Circuit, all courts of appeals to have addressed this question have also treated Seventh Amendment violations as reversible per se. See, e.g., Marshak v. Tonetti, 813 F.2d 13 (1st Cir. 1987); Amoco Oil Co. v. Torcomian, 722 F.2d 1099 (3d Cir. 1983); EEOC v. Corry Jamestown Corp., 719 F.2d 1219 (3d Cir. 1983); Lewis v. Thigpen, 767 F.2d 252 (5th Cir. 1985); Matter of Merrill, 594 F.2d 1064 (5th Cir. 1979); Hildebrand v. Bd. of Trustees of Michigan State Univ., 607 F.2d 705 (6th Cir. 1979); United States v. One 1976 Mercedes Benz, 618 F.2d 453 (7th Cir. 1980); Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316 (8th Cir. 1981); Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985); Palmer v. United States, 652 F.2d 893 (9th Cir. 1981); United States v. State of New Mexico, 642 F.2d 397 (10th Cir. 1981); Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987); Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982).

bankruptcy judge's findings.

This Court concluded that the petitioners had been denied their rights under the Seventh Amendment. Id. at 2789-2800. Having reached that conclusion, the Court held that "the Seventh Amendment entitles petitioners to the jury trial they requested," id. at 2802, reversed the judgment of the court of appeals, and remanded for further proceedings, presumably including the jury trial petitioners had wrongly been denied. Notably, this Court accorded no weight whatsoever to the bankruptcy court's factual findings. Nor, of course, did it direct the court of appeals to review those improperly entered findings for correctness. In short, unlike the Fourth Circuit in Lytle's case, this Court in Granfinanciera did not hold that petitioner's Seventh Amendment claims were precluded by the decision in the bench trial.

This Court took the same approach in Tull v. United

States, 481 U.S. 412 (1987). In that case, the district court denied Tull's timely demand for a jury trial in a suit seeking civil penalties under the Clean Water Act, conducted a 15-day bench trial, entered findings against Tull, and imposed substantial fines. Id. at 415. This Court concluded that Tull had "a constitutional right to a jury trial to determine his liability on the legal claims," id. at 425, and remanded for him to be afforded a trial by jury, id. at 427. Again, in direct contrast to the approach used by the Fourth Circuit in Lytle's case, this Court in Tull afforded no weight whatsoever to the factual findings entered after the bench trial.[23]

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[23] Of particular salience, Tull also involved issues which were properly assigned to the judge rather than the jury. See 481 U.S. at 425-27 (size of civil fine). But this Court did not find that the judge's proper participation in the last stage of the proceeding immunized his erroneous appropriation of the jury's role, even though, in adjudicating the penalty, the judge necessarily revisited many of the factual issues involved in the finding of liability.

Similarly, the fact that the judge in this case was the appropriate factfinder on Lytle's Title VII claims should not immunize his unwarranted appropriation of the jury's role in

Of this Court's earlier cases, Meeker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963) (per curiam), represents a particularly decisive rejection of the Fourth Circuit's position. In Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), a case which came before this Court on a petition for a writ of mandamus, the Court held that when the pleadings raise both legal and equitable issues, and a jury trial has been timely requested, the legal claims must be tried first before a jury, lest a premature non-jury decision on the equitable claims preclude a jury trial on those legal issues. Id. at 508-11. In Meeker, the trial judge, in violation of Beacon Theatres, decided the equitable claims first, and then relied on his own decision in favor of defendants to deny plaintiffs a jury trial, or any other relief, on their legal claims. The Tenth Circuit affirmed. 308 F.2d 875 (10th

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determining Lytle's § 1981 claims.

Cir. 1962). The petition for certiorari in Meeker challenged "[t]he error of the Court of Appeals in holding that the petitioners were in any way estopped or prohibited from contesting" their legal claims.[24] This Court granted certiorari, and after briefing and argument reversed the Tenth Circuit per curiam, citing Beacon Theatres and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

In all significant respects, the present case is Meeker. Here, too, the court of appeals has relied on the district court's findings on a plaintiff's equitable claims to justify not presenting legal claims raised in the same action to the jury. The fact that the district court here dismissed Lytle's legal claims before the bench trial, rather than simply holding them in abeyance pending the outcome of

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[24] Petition for Writ of Certiorari, October Term 1963, No. 46, p. 5.

the bench trial, does not alter the conclusion that the district court's errors denied the plaintiff his Seventh Amendment rights and must be reversed.

B. A Violation of the Seventh Amendment, Like Other Errors Which Result in the Wrong Entity Finding the Facts, Is Subject To Reversal Per Se

This Court has repeatedly held that when "the wrong entity" has conducted a trial over the objection of a litigant, reversal is the required appellate response "regardless of how overwhelmin[g] the evidence . . . ." Rose v. Clark, 478 U.S. 570, 578 (1986) (judge cannot direct verdict for conviction). This principle lies at the heart of the Court's decision last Term in Lauro Lines S.R.L. v. Chasser, 109 S.Ct. 1976 (1989). In Chasser, respondent sued petitioner in the Southern District of New York, over petitioner's objection that a forum-selection clause on respondent's ticket required all suits

to be brought in Naples, Italy. The Court held that the denial of petitioner's motion to dismiss on the basis of the forum-selection clause was not immediately appealable. It stated that "[p]etitioner's claim that it may be sued only in Naples, while not perfectly secured by appeal is adequately vindicable at that stage -- surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant . . . ." Id. at 1979. The clear import of the Court's analysis is that, if the forum-selection clause was violated, any verdict obtained in the Southern District will have to be set aside, regardless of whether the evidence would support it, because such a verdict will have been obtained from a factfinder not entitled to adjudicate the claims presented.

The perspective underlying Chasser is reflected in a wide array of cases in this Court which have rejected the assumption that the participation of an incorrect

factfinder is irrelevant if a proper factfinder could have reached the same result.[25] Cf., e.g., Gomez v. United States, 109 S.Ct. 2237 (1989) (when magistrate, rather than judge, presided over jury selection, reversal per se is required regardless of overwhelming evidence of guilt to support jury verdict); Liljeberg v. Health Services Acquisition Corp., 108 S.Ct. 2194, 2206 n. 16 (1988) (when judge should have recused himself under 28 U.S.C. § 455, new trial was required even though court of appeals held that his findings of fact had not been clearly erroneous); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825-28 (1986) (when judge should have disqualified

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[25] In any event, the clearly erroneous standard of Rule 52(a) applied by the court of appeals, see App. 10a-13a, simply cannot be appropriate to this kind of case. The Fourth Circuit did not decide that a jury could not or would not have found for Lytle. All its Rule 52(a) analysis determined was that a jury was not required as a matter of law to have done so, and thus that the judge's findings for the defendant were not wholly unsupportable. This Court has never held, in the case of a constitutional violation, that the appropriate standard of review is sufficiency of the evidence.

himself, reversal was required without regard to whether court would have decided the same way in the absence of the judge); Thiel v. Southern Pacific Co., 328 U.S. 217, 225 (1946) (verdict of jury selected from venire from which daily wage earners had improperly been excluded had to be set aside regardless of whether plaintiff was in any way prejudiced by its decision); Stevens v. Nichols, 130 U.S. 230 (1889) (where matter was improperly removed from state to federal court the latter's judgment after trial would be reversed for trial by state court); Flemming v. Nestor, 363 U.S. 603, 606-607 (1960) (where a statute mandates a three-judge court, judgment entered by a single judge must be reversed and remanded for

trial before a three-judge court, and consideration of the merits is precluded).

III. THE COURTS BELOW ERRED IN APPLYING PRINCIPLES OF COLLATERAL ESTOPPEL TO THIS CASE

The linchpin of the Fourth Circuit's analysis was its fundamentally flawed reading of this Court's opinion in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Not only did the court of appeals misread Parklane Hosiery, but its interpretation would in fact fail to serve the interests in judicial economy embodied in the doctrine of collateral estoppel.[26]

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[26] The Fourth Circuit declined to apply the collateral estoppel rule, announced in Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987), cert. denied, 108 S. Ct. (1987), and followed by the panel in the instant case, in Swentek v. USAir, 830 F.2d 552, 559 (4th Cir. 1987). See also, Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1987) (applying the traditional rule that jury trial claims may be reviewed despite an intervening decision on the issues by a trial judge, but without referring to Ritter). But cf. Dwyer v. Smith, 867 F.2d 184, 192 (4th Cir. 1989) (noting inconsistency both within and without circuit, but holding that Ritter

A. Parklane Hosiery Does Not Apply to this Case

The question presented in Parklane Hosiery was "whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party." 439 U.S. at 324 (emphasis added). Parklane Hosiery Company was the defendant in two lawsuits: the first, an equitable action by the SEC; the second, a damages action by its stockholders. The question was whether the findings entered in the SEC's non-jury trial,[27]

preclusion rule is binding in the circuit).

[27] In concluding that collateral estoppel was permitted (not, contrary to the Fourth Circuit's rule in this case, that it was required, see 439 U.S. at 331), the Court expressly noted that "[t]he petitioners did not have a right to a jury trial in the equitable injunctive action brought by the SEC." 439 U.S. at 338 n. 24. Thus, Parklane Hosiery rests on the premise that the first proceeding was decided in a proper forum. Cf. Pennoyer v. Neff, 95 U.S. (5 Otto)

and affirmed on appeal, id. at 325, could bind Parklane Hosiery in the later damages action. The Court answered that question in the affirmative.

Parklane Hosiery clearly says nothing about whether the denial of the right to trial by jury is reviewable on direct appeal. Thus, Parklane Hosiery in no way undermines the force of the Meeker-Tull-Granfinanciera line of cases. Indeed, application of collateral estoppel presumes "litigation [which] proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of res judicata and collateral estoppel will attach." Arizona v. California, 460 U.S. 605, 619 (1983) (emphasis added). As courts and commentators have recognized, there is a vast "difference between correction of procedural errors

714 (1877) (when a prior judgment was obtained in an improper forum, collateral estoppel is inappropriate).

on appeal in a single lawsuit and the refusal to inquire into possible errors when a prior judgment is offered to support preclusion." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4418 (1989 Supp.) at 104 (footnote omitted); see Roebuck v. Drexel University, 852 F.2d 715, 738 (3d Cir. 1988); Volk v. Coler, 845 F.2d 1422, 1437 (7th Cir. 1988) (same); Wade v. Orange County Sheriff's Office, 844 F.2d 951, 954-55 (2d Cir. 1988); Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987) (same); Bouchet v. National Urban League, 730 F.2d 799 (D.C.Cir. 1984) (same). See also, Williams v. Cerberonics, Inc., 871 F.2d 452, 463 (4th Cir. 1989) (Phillips, J., dissenting).[28]

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[28] The appellant in Bouchet argued that the district judge had improperly dismissed her legal claims, and then resolved against her the similar issues raised by her equitable claims. Writing for the panel in that case, then-Judge Scalia explained that not only was the appellant entitled to a jury trial on her legal claims but the erroneous denial of her

> law claims and the consequent denial of her demand for jury trial would infect the disposition of her [equitable] claim as well, since most if not all of its elements would have been presented to the wrong trier of fact. Not only would a jury trial on her tort claims be required, but the [equitable] judgment -- even if otherwise valid -- would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury.

730 F.2d at 803-04.

The Fourth Circuit has expressly rejected then-Judge Scalia's reasoning: "The Bouchet proposition is . . . set forth without reference to Parklane, despite the clear relevance of that case to the issues presented. We find th[is] lower court opinio[n] unpersuasive . . . ." Ritter, 814 F.2d at 991.

Thus, as the Seventh Circuit noted in Hussein, a case whose procedural posture was identical to that of the present case:

> We believe that the present case presents a substantially different situation than that before the Supreme Court in Parklane. Here, there is no earlier valid judgment . . . .
>
> It is hardly "needless litigation" to reverse a judgment on the ground that the plaintiff was denied his right to a jury trial through no fault of his own solely because of the error of the trial court. It is inappropriate to apply collateral estoppel to preclude review of an issue on which the appellant could not have previously sought review . . . . The burden on judicial administration is no more than in other situations in which legal error is committed and

> a retrial is required . . . . We cannot sanction an application of collateral estoppel which would permit findings made by a court . . . to bar further litigation of a legal issue . . . when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim. To permit such an application would allow the district court to accomplish by error what Beacon Theatres otherwise prohibits it from doing.

816 F.2d at 355-57.

Under the Fourth Circuit's approach, the narrow Katchen exception[29] would swallow up the broad Meeker Oil-Beacon Theatres-Dairy Queen rule. Faced with cases raising both legal and equitable claims, it would be the rare judge indeed who would not try the equitable claims first. Conducting the bench trial first would avoid the expenses and delays associated with jury trials. It would obviate the need for the kind of evidentiary rulings and

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[29] In Katchen v. Landy, 382 U.S. 323 (1966), the Court held that the Seventh Amendment is not violated by limiting trial to the court in a specialized bankruptcy scheme.

instructions that attend jury trials. And it would save the judge from facing the vast majority of post-trial motions for a judgment n.o.v. or for a new trial. Moreover, the preclusion afforded those bench rulings means that a trial court faces no costs in denying the right to a jury: even if the Seventh Amendment right was violated, the trial judge will not be required ever to conduct a jury trial. In short, the Fourth Circuit has created a powerful inducement for trial courts to violate the Seventh Amendment.

The holding in Parklane Hosiery was clearly not intended to create a perverse incentive for lower courts to violate the Seventh Amendment. Indeed, the Court's approving citation of Beacon Theatres' general prudential rule and the discussion of the limited situations under which that rule should not be followed, see 439 U.S. at 334-35 (discussing Katchen v. Landy, 382 U.S. 323

(1966)), show that Parklane Hosiery cannot be read to eliminate Seventh Amendment rights whenever bench trials have occurred.

B. The Fourth Circuit's Approach Would in Fact Undermine the Interest in Judicial Economy that the Doctrine of Collateral Estoppel Is Intended to Serve

The Seventh Amendment clearly is not a provision whose violation can be rendered harmless in the normal course of events by subsequent proceedings. Cf. Midland Asphalt Corp. v. United States, 109 S.Ct. 1494 (1989). Thus, the Fourth Circuit's rule cannot be read to bar all appellate review of Seventh Amendment claims. But if review of final judgments is barred, then appellate review must necessarily occur at some interlocutory phase of the litigation -- either (1) through mandamus proceedings prior to trial, see, e.g., Gulfstream Aerospace v.

Mayacamus Corp., 109 S.Ct. 1133, 1143 n. 13 (1988) (an "order that deprives a party of the right to trial by jury is reversible by mandamus"); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959) (same), or (2) through application of the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).[30]

In either event, the result is the same: appellate

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[30] Until now, the collateral order doctrine has been held inapplicable to denials of jury trials precisely because wrongful denials of jury trials could be corrected on appeal. See Morgantown v. Royal Insurance Co., 337 U.S. 264 (1949); Western Elec. Co. v. Milgro Electronic Corp, 573 F.2d 255, 256-57 (5th Cir. 1978) (specifically tying that conclusion to the nonapplicability of collateral estoppel when the Seventh Amendment had been violated).

But under the Fourth Circuit rule, denials of jury demands will fall under the collateral order doctrine, since they will satisfy all three prongs of the Cohen rule. See, e.g., Lauro Lines, 109 S.Ct. at 1978 (setting out the three conditions); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (same). First, such orders will "conclusively determine the disputed question," id., namely, whether the litigant has the right to trial before a jury. Second, they will "resolve an important issue completely separate from the merits of the action," id., since who the factfinder should be is in no sense equivalent to what the facts are. Finally, the very nature of the Fourth Circuit rule is to hold such orders entirely "unreviewable on appeal from final judgment." Id.

courts will continue to face claims of Seventh Amendment violations. The primary effect of the Fourth Circuit's rule will be to require interlocutory appellate review, and to prompt appeals in all cases in which a jury demand has been denied (and not only in cases where the party demanding the jury subsequently loses at the bench trial),[31] since parties whose demands have been denied will no longer be able to appeal that denial as part of an appeal from a generally adverse final judgment. Thus, the Fourth Circuit's rule will have the ironic consequence of increasing the burden on courts of appeals.

In short, the Fourth Circuit's rule does not even serve the goals it purports to further. In light of the tremendous costs it imposes on a fundamental constitutional right, it is entirely unjustified.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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[31] The availability of collateral review or mandamus does not, however, mean that an aggrieved party who elects not to utilize those avenues of review, but instead awaits conclusion of the district court proceedings, loses the right of review. 9 Wright & Miller, Federal Practice and Procedure: Civil § 2322 at p. 105 (1971). The failure to take an immediate appeal of the denial of a Seventh Amendment right has never been construed as a waiver of that constitutional right. Rule 38, Fed. R. Civ. P., specifies what constitutes waiver of the right: failure to make a timely demand. And such waiver is not to be implied lightly. See, e.g., Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("the right of jury trial is fundamental [and] courts [must] indulge every reasonable presumption against waiver"); Hall v. Sharpe, 812 F.2d 644, 649 (11th Cir. 1987); Gargiulo v. Delsole, 769 F.2d 77, 79 (2d Cir. 1985) ("plaintiffs were not required to walk out of the courtroom rather than proceed with the bench trial in order to preserve [their right of appeal]").

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August, 1989

QUESTIONS PRESENTED

1. Whether Petitioner is precluded from maintaining a cause of action for discriminatory termination and retaliation under this Court's holding in *Patterson v. McLean Credit Union* that 42 U.S.C. § 1981 does not encompass conduct after the formation of an employment contract?

2. Was the Court of Appeals correct in applying collateral estoppel to Petitioner's § 1981 claims after a full and fair hearing was held on his Title VII claims, the elements of which are identical to those under § 1981?

3. Does the Seventh Amendment require that Petitioner receive a new jury trial on his § 1981 claims when he failed to establish a *prima facie* case of discrimination during the trial of his Title VII claims?

LIST OF PARTIES

Schwitzer Turbochargers is no longer a subsidiary of, or affiliated with, Household Manufacturing, Inc. The facility in question is now operated as Schwitzer U.S. Inc., a wholly-owned subsidiary of Schwitzer Inc. Schwitzer Inc. is a publicly-traded corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-334

JOHN S. LYTLE,

Petitioner,

v.

SCHWITZER U.S. INC.,
A SUBSIDIARY OF SCHWITZER INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

John S. Lytle filed this action in December, 1984, under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) and the Civil Rights Act of 1866 (42 U.S.C. § 1981). Joint Appendix (J.A.) 4. Lytle claimed he was discharged because of his race, and retaliated against after his discharge because he filed a charge of discrimination with the Equal Employment Opportunity Commission (J.A. 4-14).

A. Summary of the Facts [1]

Petitioner was a machinist at Schwitzer's Arden, North Carolina facility for over two and one-half years.

[1] Since Petitioner's discharge claim was dismissed after his evidence, Respondent's full case on this issue is not available in this proceeding. This summary is necessarily limited to claims presented by the Petitioner at trial, to exhibits and to other items of record or points which are not in dispute.

He had the ability to become a satisfactory machinist, but refused to consistently apply himself and meet the employer's standards. As production demands grew at the newly established plant, his productivity limitations and avoidance of overtime assignments became serious liabilities. Petitioner received several disciplinary warnings and performance evaluations critical of his productivity and time wasting.

On August 11, 1983, Petitioner asked to be off work August 12 as a vacation day. The request was granted on the condition that he work Saturday, August 13. Petitioner left work early and unannounced on August 11, and did not report or call in on August 12 or 13. On Monday, August 15, he was discharged for violating Schwitzer's unexcused absence policy. This case squarely presents an employee discharge based upon the insubordinate violation of an essential company policy.

F. Petitioner's Employment Record

John S. Lytle applied for employment with Schwitzer Turbochargers (then, a subsidiary of Household Manufacturing, Inc.) on February 29, 1980. At that time, Schwitzer's new Arden, North Carolina facility had not yet begun production, and was in the initial phases of plant layout and procedures development. Lytle's employment application listed his prior experience as forklift driving, quality control, press operation, mechanics, form grinding, milling, and lathes. While Lytle had previously worked with drills and some metal lathes used at Schwitzer, most of his experience was with equipment Schwitzer did not utilize.[2] Transcript (Tr.) 84; Plaintiff's Exhibit (PX) 5.

[2] Lytle's testimony clearly established he was experienced in some facets of basic machining, but had not operated the equipment Schwitzer used in its processes. *See* Tr. 84 ("Q: Are those machines [on your employment application the same machines] that are used out there at Schwitzer? A: No. Not basically. Drills are, and some of the lathes.") Contrary to Petitioner's brief, there is no evidence that less qualified applicants (white or black) were

Judith Boone, Schwitzer's Human Resources Counselor, asked Lytle to attend a company-paid training class at the local technical college. At the end of this class, lasting approximately two weeks, Lytle would be evaluated for employment. Tr. 83. Most of the applicants in this training class were hired, including Lytle. Tr. 160.

New Schwitzer employees were promoted as they proved their ability to operate more complicated machines. Tr. 89. Lytle admittedly received promotions to more responsible and higher paying machinist positions "right along with" others hired from the same training class. His last position with Schwitzer was the highest paid production job in the plant, Machine Operator IV. Tr. 87, 89. During most of Lytle's employment at Schwitzer, his supervisor was Larry Miller. Tr. 16.

Despite Lytle's initial testimony that there were no complaints about his job performance, Lytle ultimately recalled that Larry Miller cautioned him several times concerning deficient work habits. Tr. 164. For example, on July 27, 1982, Miller issued a written warning to Lytle encouraging him to use his time more efficiently and spend less time away from the machines. Tr. 164, 166-67. Lytle's annual evaluation, issued April 29, 1982, by supervisor Mike McCrary, stated: "John can improve by accepting other assignments as a challenge, not punishment. He also needs to *stay on the job assigned* and not leave it to talk to other employees, or go to break early, etc." Tr. 168-69; PX 6 (emphasis in original). The evaluation also noted on page three that Lytle "loses interest in tasks; enthusiasm fluctuates," and on page four that he "wastes a *lot* of time" (emphasis in original). The January, 1983 performance evaluation, prepared by Larry Miller, reiterated Lytle's resistance

treated preferentially in the hiring process. At most, Petitioner made an unsupported allegation at trial that he knew of hirees who he believed were less qualified. Tr. 82.

to supervision by stating Lytle should accept assignments "as a challenge and not as punishment; this would improve his initiative, relations with others, schedule consciousness and dependability." Tr. 170; PX 7.

On August 3, 1983, Miller again warned Lytle that he was spending too much time away from his machine while it was in operation.[3] Tr. 167. Despite this unequivocal warning, Miller was forced to warn Lytle, the very next day, that his production level must increase or his job may be jeopardized. Tr. 166. These selected warnings establish Miller's efforts to focus Lytle's attention on his job and correct his consistently subpar production levels.[4]

C. The Events of August 11-15, 1983

Respondent maintained written policies governing employee absenteeism. PX 22; Tr. 17. The purpose of the absence policy was to recognize, provide for and schedule necessary personal absence, tardies and early departures. PX 22, p. 1. Excessive *excused* absence, tardy, etc., was defined as a total absence level which exceeded four percent of the total available working hours including overtime. Tr. 18. Excessive *unexcused* absence, tardy, etc.,

[3] The uncontroverted evidence, established by Miller's affidavit in defendant's Motion for Summary Judgment, was that Lytle failed to report that his machine was out of order for four hours. Miller urged Lytle to use time more efficiently in order to avoid overtime assignment (Docket Entry No. 13).

[4] Miller met with Lytle for the specific purpose of discussing this poor production record. For example, Lytle's scheduled production rate in August, 1983, was 513 bearing housings per week. During the first week in August, he produced only 408 parts, or 105 parts short of the goal. On Monday, August 8, Miller informed Lytle overtime would be required that entire week to reduce the bearing housing deficit. An overtime notice was posted repeating this schedule. *See* defendant's Motion for Summary Judgment (Affidavit of Larry Miller) and Attachment A thereto (Docket Entries 11, 12, and 13).

was defined as *unexcused* absence which exceeds eight hours (or one work shift) in the preceding twelve months. Tr. 17. Either type of excessive absence could lead to termination. Tr. 19. Employees were also instructed to phone the plant when an absence must occur. Tr. 21-22.

On Thursday, August 11, 1983, Supervisor Miller posted a notice in Lytle's department requiring eight hours of overtime on Saturday, August 13, for Lytle and four other machinists, in addition to the overtime which had previously been scheduled for that week. *See* n. 4, *supra*.[5] That same day, Lytle asked Miller for a *vacation day* off on Friday, August 12, and Miller agreed. Tr. 130. Later in the day (pursuant to the previously posted overtime schedule), Miller reminded Lytle of his obligation to work Saturday. Tr. 131, Tr. 140-41. Lytle claimed at trial that he explained he was going to the doctor Friday (August 12) and was unfit to work Saturday (August 13). However, according to Lytle's own workplace diary and his own trial testimony, Miller clearly and consistently told Lytle he would have to select and work one of the two days as a condition of receiving any time off.[6]

[5] Defendant's Motion for Summary Judgment, Affidavit of Larry Miller, Paragraph 9. Lytle had worked only 17 of his 28 scheduled overtime hours in the previous three weeks. *Id.*, Affidavit of Al Duquenne, Paragraph 15 (Docket Entries No. 12 and 13).

[6] Plaintiff maintained a diary at work in which the August 11 1983, entry reads: "At 10:30 I asked Larry for a vacation day for Friday, August the 12th. He said okay, but I would have to work Saturday the 13th." Tr. 174. In addition, Lytle testified at trial, regarding the conversation with Miller on the afternoon of Thursday, August 11:

> A. It was roughly two o'clock. I was going to get a tool—.
>
> . . .
>
> A. . . . and I encountered Mr. Miller. He then asked me what was I going to do about Saturday, and I asked him what

Lytle admittedly left work 1.8 hours before completion of his scheduled overtime hours on Thursday, August 11; without telling Miller. Tr. 133, 172-73. He did not call in or report to work Friday, August 12, and did not call in or report to work on Saturday, August 13. Tr. 172-73. Pursuant to company policy, Lytle was terminated on Monday, August 15, 1983, for excessive unexcused absenteeism.

D. Post-Discharge Employment References

Eight days after his discharge, Lytle filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging race discrimination. PX 1; Tr. 146. He later applied for work with ABF Trucking, Thomas & Howard (Ingles Warehouse), Uniforce Temporary Service, and Perfection Gear. Tr. 147-48, 179-80. Each prospective employer requested and received a reference from Schwitzer. Pursuant to Schwitzer's established reference policy, only Lytle's dates of employment and job title were provided to prospective employers. Tr.

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about Saturday. He said, if you're off Friday, you have to work Saturday.

I explained to him then that I wanted Friday off to see the doctor, and I wouldn't be able to work Saturday because I was physically unfit. And at that time he still stated, well, you're going to have to work one of the days. Well, you'll have to work Saturday. And I told him I couldn't, that if I had to I'd give him another vacation day, because I did have that. But I did make kind of a joke that if I gave you a day, which I couldn't work, if I gave you one of my vacation days, well, you're going to pay me time and a half for that vacation day.

At that time, he walked off, and I went to the tool supply room . . . (Tr. 131-32).

Miller stated in his affidavit supporting defendant's Motion for Summary Judgment that Lytle was told to select one of the two days as vacation, or the request would be denied as to *both* days. Lytle did not give a reason for the vacation request even though Miller asked for a reason (Paragraph 10-12; Docket Entry No. 13).

64, 260-64. Both Uniforce and Perfection Gear hired Lytle. *Id.*

The personnel director at Thomas & Howard testified that Schwitzer's reference included Lytle's employment dates and last job title held. *See* Tr. 112; Tr. 263. This reference was similar to references that Thomas & Howard had received in the past from other employers. Tr. 115. Schwitzer did not provide any negative information concerning Lytle or his discharge. Tr. 115. Thomas & Howard's decision to reject Lytle's application was not based on information provided or withheld by Schwitzer. Tr. 114-188. The branch manager of ABF Freight Systems (ABF Trucking), Adrienne Finch, testified that Lytle applied for work in late 1983. Tr. 100. Finch forwarded Lytle's application to the Fort Smith, Arkansas headquarters where all hiring decisions are made. Tr. 103-06. Finch had no personal knowledge of the reference provided by Schwitzer to the Fort Smith office. Tr. 105-06. Significantly, Schwitzer's Human Resource Counselor Boone provided ABF Freight with the same neutral reference she had given prospective employers of other terminated employees. Tr. 66, 261-62.[7]

Lytle began working at Perfection Gear as a temporary employee provided by Uniforce Temporary Services in October, 1984. Tr. 280. He became a permanent employee of Perfection Gear in December, 1984. On May 24, 1985, Lytle exceeded the maximum number of permissible absences under Perfection's absenteeism policy. Tr. 284. On that day, Lytle called Perfection Gear and resigned. Tr. 284-85.

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[7] Boone's uncontradicted testimony was that she had a policy and practice of providing the same neutral reference for all discharged employees. As examples, she cited Harold Messenger, Pat Dodge and Arnold Henson. Each of these former employees is white and none had filed charges with the EEOC. Tr. 264-65, 267. Additional examples were available, but the trial judge sustained an objection to further testimony on this issue. Tr. 267.

E. Summary of the Proceedings

Petitioner's action was tried before the court on February 26-27, 1986. The court granted Schwitzer's pre-trial motion to dismiss all claims under 42 U.S.C. § 1981 because no independent factual basis was alleged to support them, leaving Title VII as the exclusive remedy. J.A. 56-57. At the close of Petitioner's evidence, the court granted a Rule 41(b) motion by Respondent as to the discharge claim. The court found by Lytle's own evidence that he violated the unexcused absence policy by 9.8 hours, which was not comparable to a white employee's six minute violation.[8] Thus, the Court concluded, as a matter of law, that Petitioner had not presented a prima facie case to the court. J.A. 58-60. After Respondent's evidence regarding retaliation, the court granted a Rule 41(b) motion and dismissed the action.

The Fourth Circuit Court of Appeals affirmed the district court in an unpublished opinion on October 20, 1987. While the court found that the trial court erred in dismissing Lytle's § 1981 claims prior to trial, the court concluded that remand was unnecessary because the district court's Title VII findings were entitled to collateral estoppel effect and would prevent the relitigation of these findings under a "legal" theory arising out of the same facts. Rehearing was denied April 27, 1987. The petition for a writ of certiorari was filed August 23, 1988, and granted July 3, 1989.

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[8] Petitioner's brief asserts that the trial court found that Lytle had a total of 9.8 hours unexcused absence. *See* Pet. Br. at 11 n. 6 and 33 n. 20. In fact, however, the court found that Lytle's own evidence established that he had 9.8 hours of "*excess* unexcused absence" (J.A. 59; emphasis added)—i.e., 9.8 hours in excess of the 8 hours allowed under Schwitzer's unexcused absence policy. Even if Petitioner's current version is accepted, Lytle's unexcused absences were plainly different in kind and degree from any other employee on record.

SUMMARY OF ARGUMENT

There are at least three separate and independent grounds for this Court to affirm the judgment of the Fourth Circuit. The most appropriate basis for such an affirmance is the Court's recent decision in *Patterson v. McLean Credit Union*, —— U.S. ——, 105 L. Ed. 2d 132 (1989), decided after the Fourth Circuit's decision herein. Although the statutory viability of Lytle's § 1981 claims was not addressed by the court of appeals, it is well established that Schwitzer, as the prevailing party below, may defend the lower court's judgment on any basis fairly presented by the record. Moreover, disposition on the basis of *Patterson* is especially appropriate here, because it will permit the Court to avoid unnecessarily deciding the constitutional questions raised by Petitioner.

Turning to the impact of *Patterson*, it is clear that Petitioner's asserted § 1981 claims for discriminatory discharge and retaliation cannot survive this Court's construction of that statute in *Patterson*. The Court held quite emphatically in that case that § 1981 does not provide a general proscription of race discrimination in all aspects of contract relations. Rather, the statute protects only the right "to make" contracts and the right "to enforce" contracts on the same basis as white citizens. These terms must be interpreted in accordance with their plain meaning, with the result that conduct occurring after the formation of a contract is generally not covered by § 1981 unless it involves race-based efforts to impede access to legal process to resolve contract claims.

Neither of Petitioner's claims falls into these categories. His discharge claim obviously involves only post-formation conduct, and it amounts to an allegation of disparate rule enforcement which, according to *Patterson*, falls outside the purview of § 1981. Similarly, his retaliation claim involves only post-formation conduct, is purely a creature of a different statute (Title VII of the Civil

Rights Act of 1964), and does not even involve race-based discrimination (which is the gravamen of § 1981 actions). Thus, on the basis of *Patterson*, this Court should affirm the judgment of the Fourth Circuit or, alternatively, dismiss the writ of certiorari as improvidently granted.

The second basis for affirming the judgment below is the analysis of the Fourth Circuit itself. The court of appeals correctly concluded that the doctrine of collateral estoppel precludes relitigation of the district court's Title VII findings, and hence that Lytle had no viable § 1981 claims inasmuch as the elements of Title VII and § 1981 claims are identical.

This decision is consistent with *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), in which the Court held that judicial factual determinations could constitutionally preclude relitigation of the same facts before a jury pursuant to a legal cause of action. In addition, it is not inconsistent with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), which only establishes a prudential rule whereby courts are directed to permit juries to determine all issues common to both legal and equitable claims where both types of claims are being tried in the same proceeding. That is not the situation here, however, because the trial court's findings were made when there were no pending legal claims which would require jury determination. Thus, this case is more similar to the situation in *Parklane Hosiery*—factual issues on which petitioners had a right to jury trial were tried and determined adversely by the courts under parallel equitable claims which the courts had a constitutional right to decide given the posture of the case.

Finally, the district court's dismissal of the § 1981 claims did not impact the proper resolution of this case. When a plaintiff's evidence is insufficient to defeat a motion for a directed verdict, the Seventh Amendment is not violated by the failure to submit the case to the jury. *Galloway v. United States*, 319 U.S. 372, *rehearing denied*, 320 U.S. 214 (1943). Similarly, when a directed verdict is appropriate, the erroneous denial of a jury trial constitutes harmless error. *Laskaris v. Thornburg*, 733 F.2d 260 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984). Here, the district court dismissed Lytle's Title VII discharge claim at the conclusion of Lytle's evidence, ruling, as a matter of law, that Lytle had not established the elements of a *prima facie* case. The court made a similar ruling regarding the retaliation claim at the conclusion of all the evidence. Thus, Petitioner's evidence would not have withstood a motion for a directed verdict and, as a consequence, any error regarding denial of a jury trial would have to be deemed harmless error.

ARGUMENT

I. THE FOURTH CIRCUIT'S JUDGMENT SHOULD BE AFFIRMED ON THE BASIS OF THIS COURT'S DECISION IN *PATTERSON v. McLEAN CREDIT UNION*

Petitioner contends that the Fourth Circuit's decision improperly deprived him of his Seventh Amendment right to a jury trial on his § 1981 claims for discriminatory discharge and retaliation. However, the Court's recent decision in *Patterson v. McLean Credit Union*, —— U.S. ——, 105 L. Ed. 2d 132 (1989), makes clear that § 1981 does not provide a cause of action for discriminatory discharge, or for retaliation in response to protected activities. Accordingly, this Court should affirm the Fourth Circuit's judgment on the basis of *Patterson* or, alternatively, dismiss the writ of certiorari as improvidently granted. *See Piccirillo v. New York*, 400 U.S. 548, 548-59 (1971) (writ dismissed as improvidently granted because intervening court decision meant that constitutional question on which Court granted certiorari was no longer necessary to resolution of the case).

Initially, it is well settled that Schwitzer, as the prevailing party below, may defend the appellate court's

judgment on any ground raised in the courts below, whether or not that ground was relied upon, rejected or even considered by the lower courts. *E.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977) ("prevailing party may defend a judgment on any ground which the law and the record permit. . . ."). Indeed, a respondent or appellee before this Court may even defend a judgment on grounds not previously urged in the lower courts,[9] and this is especially appropriate where, as here, an intervening decision by this Court has changed controlling law. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 n. 7 (1984) (permitting a petitioner, who is normally limited to issues presented in the petition for certiorari, to raise issue for first time before this Court because of intervening change in controlling law). Finally, it is particularly appropriate for the Court to consider alternative statutory grounds for affirmance where, as here, the Petitioner has posed a constitutional challenge to the decision below. *See Jean v. Nelson*, 472 U.S. 846, 854 (1985), *quoting Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944) (federal courts must consider statutory grounds for judgment before reaching any constitutional questions because "[i]f there is one doctrine more deeply rooted than any other . . ., it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

In short, both this Court's precedents and the posture of this case suggest very strongly that the Court should dispose of the instant case on the *Patterson* issues rather

[9] *Schweiker v. Hogan*, 457 U.S. 569, 585 & n. 24 (1982), *quoting Blum v. Bacon*, 457 U.S. 132, 137 n. 5 (1982) ("Although appellees did not advance this argument in the District Court, they are not precluded from asserting it as a basis on which to affirm the court's judgment . . . [because it] 'is well accepted that . . . an appellee may rely upon any matter appearing in the record in support of the judgment.'").

than the Seventh Amendment issues raised by Petitioner. Here, Schwitzer has asserted from the outset that Petitioner could not maintain causes of action for termination and retaliation under § 1981 (J.A. 44, 51-56). *Patterson* provides significant new guidance on that question, and it presents purely legal, non-constitutional issues that can be decided on the instant record with no prejudice to the parties. Accordingly, we turn now to a discussion of how *Patterson* impacts this case and requires affirmance of the Fourth Circuit's judgment.[10]

The relevant portion of § 1981 under scrutiny in *Patterson* provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981. The *Patterson* Court emphasized that, contrary to the trend in lower court cases, § 1981 "cannot be construed as a general proscription of racial discrimination in all aspects of contract relations." *Patterson*, 105 L. Ed. 2d at 150. Rather, the Court held that the right "to make" contracts "extends only to the formation of a contract," that is, "the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Id.* Thus, the Court refused to ex-

[10] The *Patterson* decision applies retroactively. *See, e.g., Morgan v. Kansas City Area Transportation Authority*, —— F. Supp. —— (W.D. Mo. 1989) [1989 Westlaw 101802]; *Leong v. Hilton Hotels, Inc.*, —— F. Supp. ——, 50 FEP Cases 733 (D. Hawaii 1989). The majority of courts faced with this issue have implicitly found that the decision should be applied retroactively. *See, e.g., Overby v. Chevron U.S.A., Inc.*, 884 F.2d 470 (9th Cir. 1989); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989). *But see Gillespie v. First Interstate Bank of Wisconsin Southeast*, 717 F. Supp. 649 (E.D. Wisc. 1989). Retroactive application of judicial decisions is the rule, not the exception, *United States v. Givens*, 767 F.2d 574, 578 (9th Cir.), *cert. denied*, 474 U.S. 953 (1985). In addition, "[t]he usual rule is that federal cases should be decided in accordance with the law at the time of decision." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987).

tend this aspect of § 1981's coverage to discriminatory conduct occurring after the formation of a contract:

> [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relationship has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment. . . .

105 L. Ed. 2d at 150-51. *See also* 105 L. Ed. 2d at 152, 155. Consistent with this rationale, the Court held that Patterson's claim of pervasive workplace racial harassment involved only post-formation conduct which was not cognizable under § 1981.[11]

The Court gave a similarly restrictive reading to the second relevant aspect of § 1981. The Court held that the right "to enforce" contracts established in § 1981 "embraces protection of a legal process, and of a right to access to legal process, that will address and resolve contract-law claims without regard to race." 105 L. Ed. 2d at 151. While this protection may extend to private race-based efforts to impede access to contract relief,[12]

[11] The Court recognized that § 1981 may cover post-formation conduct in those limited situations where the conduct denies an employee the right to "make" a new employment contract with the employer. For example, a race-based refusal to promote may or may not be actionable under § 1981, depending upon whether the nature of the change in position is such that it would involve entering into a new contract with the employer. 105 L. Ed. 2d at 156. "Only where the promotion rises to the level of an opportunity for a new and distinct relationship between the employee and the employer is such a claim actionable under § 1981." *Id.*

[12] The Court cited the example of a labor union which bears explicit responsibility for prosecuting employee contract grievances and which carries out that responsibility in a racially discrimina-

the right "does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.*

Aside from the fact that these constructions comport with the "plain and common sense meaning" of § 1981's statutory language (105 L. Ed. 2d at 156 n. 6), the *Patterson* Court also recognized that strong policy considerations support such limited constructions. 105 L. Ed. 2d at 152-53. An employee who suffers post-formation discrimination may seek relief under the administrative procedures provided in Title VII. In that statute, Congress established an elaborate administrative procedure designed to assist in the investigation of discrimination claims and to work towards the resolution of these claims through conciliation rather than litigation. *See* 42 U.S.C. § 2000e-5(b). Only after these procedures have been exhausted may a plaintiff bring a Title VII action in court. *See* 42 U.S.C. § 2000e-5(f)(1). Thus, permitting an employee to pursue a parallel claim under § 1981 without resort to the statutory prerequisites would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims," rendering such procedures "a dead letter." *Patterson*, 105 L. Ed. 2d at 153.

Applying the *Patterson* standards to the instant case, it is clear that the Petitioner has no viable claims under § 1981. Petitioner does not contend that Respondent prevented him from entering into or enforcing a contract because of his race. Instead, he contends that Respondent discriminatorily discharged him and then retaliated against him for filing a charge with the EEOC. Petitioner's right under § 1981 to make or enforce a contract on a race-neutral basis is therefore not implicated.

tory manner. 105 L. Ed. 2d at 151, *citing Goodman v. Lukens Steel Co., supra.*

First, a discharge is, by definition, post-formation conduct which does not involve an employee's right to make or enforce a contract. Such conduct, therefore, falls outside the purview of § 1981. *See Leong v. Hilton Hotels Corp., supra; Copperidge v. Terminal Freight Handling Co.*, —— F. Supp. —— 50 FEP Cases 812 (W.D. Tenn. 1989); *Sofferin v. American Airlines, Inc.*, 717 F. Supp. 587 (N.D. Ill. 1989); *Hall v. County of Cook, State of Illinois*, —— F. Supp. —— (N.D. Ill. 1989) [1989 Westlaw 99802]; *Greggs v. Hillman Distributing Co.*, —— F. Supp. ——, 50 FEP Cases 1173 (S.D.N.Y. 1989). *But see Padilla v. United Air Lines*, 716 F. Supp. 485 (D. Colo. 1989).[13]

Second, Petitioner's discharge claim is, at bottom, nothing more than an assertion that he was punished more severely for absenteeism than were similarly situated white employees. *See* Pet. Br. at 8-12. This is precisely the type of conduct the *Patterson* dissent argued should be covered by § 1981. *See* 105 L. Ed. 2d at 170 (stating that § 1981 was intended to prohibit "the practice of handing out severe and unequal punishment for perceived transgressions"). However, the *Patterson* majority clearly rejected the dissent's position that such discriminatory rule application is sufficient to state a claim under § 1981. 105 L. Ed. 2d at 155. While recognizing that such post-formation discrimination might be evidence that any divergence in explicit contract terms is due to racial animus, the majority nevertheless emphasized that the "critical . . . question under § 1981 remains whether the employer, *at the time of the formation of the contract*, in fact intentionally refused to

[13] This district court decision upholding discharge claims under § 1981 demonstrates that the lower courts have not, in fact, had "little difficulty applying the straightforward principles that [the Court announced in *Patterson*]." *Patterson*, 105 L. Ed. 2d at 156 n. 6. This provides an additional reason why the Court should take this opportunity to reiterate the reach of § 1981 and the *Patterson* decision.

enter into a contract with the employee on racially neutral terms." *Id.* (emphasis in original).

Finally, Petitioner does not and cannot contend that his discharge was a race-based effort to obstruct his access to the courts or other dispute resolution processes. Indeed, his discharge had nothing to do with any effort to enforce contract rights or claims.

In short, the Petitioner's discharge claim in the instant case involves post-formation conduct unrelated to his right to make or enforce a contract, and hence it is not cognizable under § 1981.

Petitioner's retaliation claim is even farther afield from § 1981 coverage. First, like Petitioner's discharge claim, the retaliation claim involves only post-formation conduct and therefore is not actionable under § 1981. *Overby v. Chevron U.S.A., Inc., supra; Williams v. National Railroad Passenger Corp.*, 716 F. Supp. 49 (D.D.C. 1989); *Dangerfield v. Mission Press*, —— F. Supp. ——, 50 FEP Cases 1171 (N.D. Ill. 1989).

Second, the prohibition of retaliation against employees for filing discrimination charges is purely a creature of statute, having come into existence only by an express prohibition in Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a). Indeed, the prohibition specifically relates only to the exercise of rights conferred by Title VII. Not only did the right to be free from such retaliation not exist before the passage of Title VII, *see Great American Savings & Loan Association v. Novotny*, 442 U.S. 366, 377-78 (1979), but it would be inappropriate to inject rights created by one statute into another statute passed approximately 100 years earlier. *See Warren v. Halstead Industries*, —— F. Supp. ——, 33 FEP Cases 1416 (M.D.N.C. 1983) (questioning whether a cause of action created by Title VII is actionable under § 1981). *See also Saldivar v. Cadena*, 622 F. Supp. 949 (W.D.

Wisc. 1985) (retaliation for advocacy of equal protection does not support a § 1981 claim).

Moreover, this conclusion is particularly appropriate given the *Patterson* Court's admonition against stretching § 1981 to protect conduct already covered by Title VIII. *Patterson*, 105 L. Ed. 2d at 153. The Court's concern with frustrating Title VII's conciliation goals, discussed above, "is particularly apt where the very conduct complained of centers around one of Title VII's conciliatory procedures: the filing of an EEOC complaint." *Overby v. Chevron U.S.A. Inc.*, 884 F.2d at ——, 50 FEP Cases at 1213. Since § 704(a) of Title VII proscribes Respondent's alleged retaliatory conduct, the Court should "decline to twist the interpretation of another statute (§ 1981) to cover the same conduct." 105 L. Ed. 2d at 153.

Finally, and perhaps most importantly, retaliation for filing Title VII charges is not even a race-based issue, which is the *sine qua non* of § 1981 coverage. The anti-retaliation provisions of Title VII are designed to protect channels of information, not freedom from race-based conduct, and they are equally available to employees irrespective of their race, sex, national origin, etc. *See Eichman v. Indiana State University Board of Trustees*, 597 F.2d 1104, 1107 (7th Cir. 1979) (§ 704 of Title VII "extends protection to all who 'assist' or 'participate' regardless of their race or sex"). Thus, put quite simply, a claim of retaliation for filing Title VII charges has nothing to do with an employee's § 1981 right to make and enforce contracts on the same basis as white citizens. Indeed, even before this Court's *Patterson* decision, many lower courts had held that discrimination based on factors other than race, such as retaliation in violation of § 704(a) of Title VII, does not violate § 1981. *See, e.g., Hudson v. IBM*, —— F. Supp. ——, 22 FEP Cases 947 (S.D.N.Y. 1975); *Takeall v. WERD, Inc.*, —— F. Supp ——, 23 FEP Cases 947 (M.D. Fla. 1979);

Grant v. Bethlehem Steel Corp., —— F. Supp. ——, 22 FEP Cases 680 (S.D.N.Y. 1978); *Barfield v. A.R.C. Security, Inc.*, —— F. Supp. ——, 10 FEP Cases 789 (N.D. Ga. 1975).[14] The correctness of that conclusion has only been confirmed by *Patterson's* mandate that § 1981 be interpreted in accordance with the plain and common sense meaning of its terms and that courts should avoid "twist[ing] the interpretation of [§ 1981] to cover the same conduct" covered by Title VII. 105 L. Ed. 2d at 153.

In sum, while both of Petitioner's claims are cognizable under Title VII, and indeed have been given full consideration under that statute, neither is cognizable under § 1981. Accordingly, this Court should either affirm the Fourth Circuit's judgment on the basis of *Patterson* or dismiss the writ of certiorari as improvidently granted.

II. THE SEVENTH AMENDMENT DOES NOT REQUIRE RETRIAL OF ISSUES ALREADY DECIDED BY THE DISTRICT COURT

The preceding section demonstrates that the fundamental predicate of Petitioner's Seventh Amendment argument no longer exists. Specifically, the collateral estoppel and jury trial issues arose in the Fourth Circuit only because the court assumed that the district court had erroneously dismissed Petitioner's § 1981 claims. If dismissal was proper—and the foregoing section shows it was—then no new trial is necessary and, *a fortiori*, the question of whether collateral estoppel is applicable does not arise. As a consequence, the Court need not reach the collateral estoppel/Seventh Amend-

[14] Although there are cases to the contrary (*e.g., Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982)), they are not in keeping with the statutory intent of § 1981 to prohibit employment decisions based on *race*, rather than post-discharge actions allegedly based on participation in statutory proceedings under Title VII.

ment issue in order to affirm the judgment of the court of appeals. Nevertheless, we show below that the Fourth Circuit's application of collateral estoppel to Petitioner's § 1981 claims is consistent with this Court's decisions.

If the Court addresses the collateral estoppel issue, it should uphold the decision of the court of appeals. The Fourth Circuit held that the doctrine of collateral estoppel precluded relitigation of the facts already decided by the district court and, as a consequence, that Lytle had no viable § 1981 claim since the elements of Title VII and § 1981 are identical. This decision is consistent with the purpose of collateral estoppel, which is to protect litigants from the burden of relitigating an identical issue with the same party or his privy and to promote judicial economy by preventing needless litigation. *See University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986); *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971).

Contrary to Petitioner's contention, the Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), does not require a different result. *Beacon Theatres* holds that when legal and equitable claims are joined in one proceeding, the legal claims should be tried first before a jury if possible. Although derived from the Seventh Amendment, this doctrine is nothing more than a "general prudential rule" for courts to follow. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335 (1979).[15] Like most other rules of constitutional origin, the *Beacon Treatres* doctrine cannot be woodenly applied

[15] In *Katchen v. Landy*, 382 U.S. 323 (1966), the Court stated that the *Beacon Theatres* rule is an equitable doctrine which is inapplicable when Congress develops a statutory scheme contemplating the prompt trial of disputed claims without the intervention of a jury.

and must yield when outweighed by other important principles.[16]

Moreover, in *Parklane Hosiery*, this Court itself addressed the conflict between the *Beacon Theatres* rule and the principle of judicial economy underlying the doctrine of collateral estoppel, and its decision fully supports the Fourth Circuit's analysis. In that case, the Court rejected the argument that the Seventh Amendment prohibits application of collateral estoppel to preclude a jury trial of facts previously decided by an equity court and found that the Seventh Amendment does not establish such a rigid barrier to the efficient operation of our legal system. Instead, the Court adopted a more pragmatic view of the Seventh Amendment, one which guarantees the plaintiff a full and fair opportunity to litigate his claims, but prohibits needless relitigation of facts already decided. Using this realistic approach, the Court concluded that any harm caused by the denial of a jury trial was clearly outweighed by the judicial interest in the economical resolution of cases. Thus, the Court held that application of collateral estoppel does not violate the Seventh Amendment where "there is no further fact-finding function for the jury to perform, since the common factual issues have been decided." *Id.* at 336.

This is precisely the rationale the Fourth Circuit applied in the instant case. In doing so, the court followed its earlier decision in *Ritter v. Mount Saint Mary's College*, 814 F.2d 986 (4th Cir.), *cert. denied*, 484 U.S. 913 (1987), in which the district court had dismissed the plaintiff's claims under the Age Discrimination and Equal Pay Acts,[17] and tried the Title VII claims without a jury.

[16] *Katchen v. Landy*, 382 U.S. at 339-40. *Cf. Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984) (First Amendment rights subject to reasonable restrictions).

[17] 29 U.S.C. § 621 *et seq.*, and 29 U.S.C. § 206(d), respectively. Unlike Title VII, both of these statutes provide for trial by jury.

After determining that the legal and equitable claims shared common elements, the *Ritter* court held that the factual determinations made by the district judge in dismissing the Title VII suit collaterally estopped relitigation of the same issues on the legal claims. The court found this situation squarely within this Court's holding in *Parklane Hosiery*:

> This court need not involve itself in the laborious and inconclusive policy analysis suggested by the parties on this issue, however, because the Supreme Court has already undertaken this policy analysis for us. *Parklane* decided that the judicial interest in the economical resolution of cases, which interest underlies the doctrine of collateral estoppel, does override the interest of the plaintiff in re-trying before a jury the facts of a case determined by a court sitting in equity.

Ritter, 814 F.2d at 991.

The Fourth Circuit's decision in this case promotes the same policy considerations enunciated in *Parklane* and *Ritter*. Petitioner received a full and fair opportunity to try his Title VII claims before the district judge and his efforts fell short. Schwitzer was awarded an involuntary dismissal on the termination claim after the presentation of Lytle's evidence and Petitioner's retaliation claim was involuntarily dismissed at the end of all the evidence (J.A. 60, 64). In these circumstances, Lytle's request for a new trial before a jury is outweighed by the interests furthered by collateral estoppel.

Nor has Petitioner cited any persuasive argument or authority requiring a contrary result. First, Petitioner is plainly wrong in suggesting that collateral estoppel may not be applied to prevent relitigation of issues in the same suit. Indeed, the *Parklane Hosiery* decision specifically recognized that the major premise underlying the *Beacon Theatres* rule is that, unless legal claims are determined prior to equitable claims, a judge's factual findings on the equitable claims would collaterally estop the jury's redetermination of those issues. *Parklane Hosiery*, 439 U.S. at 334.[18]

Second, Petitioner begs the question by arguing that "[t]his Court has *never* excused the Seventh Amendment violation by holding that the judge's intervening factual findings pretermit presentation of a litigant's case to a jury." Pet. Br. at 35 (emphasis in original). It is true that, once a Seventh Amendment violation is found, the proper course is to re-try the case before the jury. However, that does not answer the question of *whether* the Seventh Amendment is violated by giving collateral estoppel effect to a judge's findings on equitable claims that are properly determinable by the court in the absence of then-pending legal claims raising the same issues.

Nor do the cases cited by Petitioner answer this latter question. *See* Pet. Br. at 35-40. Most of those cases involved straightforward situations in which the district court had simply made an erroneous determination that the claims or issues in dispute should be tried to the court rather than to a jury. *E.g., Granfinanciera v. Nordberg*, —— U.S. ——, 106 L. Ed. 2d 26 (1989); *Tull v. United States*, 481 U.S. 412 (1987); *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Curtis v. Loether*, 415 U.S. 189 (1974); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932).[19] In such situations, the judge's determination

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[18] In addition, as noted by the court in *Ritter*, the prior suit notion merely reflects the manner in which the application of collateral estoppel typically arises. *Ritter*, 814 F.2d at 991-92. If collateral estoppel can be used to bind persons to judgments in which they were not parties, it would be illogical to refuse to apply the principle to the same parties that litigated the issues before the district court.

[19] For example, in the *Granfinanciera* case, the only claim presented involved an alleged fraudulent transfer. The court denied defendant's jury trial request and entered judgment for plaintiff. This Court reversed and directed a jury trial on the fraudulent

of the claims is the essence of the Seventh Amendment error, and is properly subject to being vacated on appeal.

Here, by contrast, the trial court's alleged error did not involve a direct violation of the Seventh Amendment, as would have occurred if the district had simply determined that § 1981 claims are triable to the court. Instead, the court's alleged error was the dismissal of the § 1981 claims, since it is undisputed that courts, rather than juries, appropriately determine Title VII claims. *See Great American Savings & Loan v. Novotny*, 442 U.S. 366, 375 (1979).

The instant case, then, is distinguishable from the cases cited by Petitioner in a critical respect: here, the court's findings were made at a time when there were no pending legal claims which would require jury determination.[20] And in this respect, the instant case is identical to the situation in *Parklane Hosiery*—factual issues on which petitioners had a right to a jury trial were tried and determined adversely by the courts under parallel equitable claims which the courts had a right to decide given the posture of the case.

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transfer claim. Similarly, in *Tull* the Court held that the Seventh Amendment guarantees a jury trial for determination of liability under the Clean Water Act, 33 U.S.C. § 1319(b), (d). The only portion of that case not requiring jury resolution was the *amount* of the civil penalty. Of course, the size of the penalty can only be determined after jury resolution of liability issues. Thus, there was no claim pertaining to liability properly tried by the court.

[20] This fact also serves to distinguish *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963), upon which Petitioner places heavy reliance. *See* Pet. Br. at 39-40. As described by Petitioner, *Meeker* involved nothing more than a straightforward application of the *Beacon Theatres* rule—i.e., the trial court had pending before it both legal and equitable claims with common factual issues, and it violated the *Beacon Theatres* rule by choosing to decide the equitable claims first, thereby foreclosing jury determination of the legal issues.

Equally important, moreover, the interests of judicial economy advocated in *Parklane Hosiery* apply whether or not the dismissal of the legal claims was in error. Under the teachings of *Parklane*, the critical issue is not whether the trial court's denial of the jury trial was correct, but whether harm resulted from the denial. *Ritter*, 814 F.2d at 991. As long as the district judge's factual findings were not erroneous, Lytle was not prejudiced and the judicial interests underlying the doctrine of collateral estoppel outweigh any nominal injury. Otherwise, the parties must conduct a full trial to the bench with the risk that it may be for naught if any of the legal claims are reversed and remanded to be tried by a jury, at a cost of substantial time and resources to the court and to the litigants. *Id.* The parties' motivation in litigating such a provisional trial would be questionable. Fortunately, in *Parklane Hosiery* this Court balanced the interests involved and found that the scale tipped in favor of applying collateral estoppel. Where, as here, Petitioner has been provided a full and fair opportunity to litigate his claims, "one trial of common facts is enough." *Ritter*, 814 F.2d at 991.[21]

Finally, contrary to Petitioner's assertion, the Fourth Circuit's decisions in *Lytle* and *Ritter* will not eliminate the *Beacon Theatres* rule. The *Lytle* and *Ritter* reasoning applies only where the court tries a parallel equitable claim and there are no legal claims pending. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 464-65 (4th Cir. 1989) (Phillips dissenting); *Dwyer v. Smith*, 867

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[21] Petitioner's contention that the right to jury trial is particularly important in § 1981 cases is contrary to *Independent Federation of Flight Attendants v. Zipes*, —— U.S. ——, 105 L. Ed. 2d 639 (1989), where the Court held that Congress did not intend for Title VII to override other procedural and judicial interests. Collateral estoppel is equally applicable to civil rights claims as it is to other matters. *University of Tennessee v. Elliot*, 478 U.S. 788, 796-97 (1986) ("Congress, in enacting civil rights statutes, did not intend to create an exception to general rules of preclusion").

F.2d 184, 192 n. 4 (4th Cir. 1989). Thus, the vast majority of cases will continue to be decided in accordance with the prudential rule of *Beacon Theatres*, in which pending legal claims are decided first whenever they are joined in the same action with equitable claims.[22] Indeed, the Fourth Circuit has shown that it will conscientiously follow this principle. *See e.g., Grossos Music v. Mitken, Inc.*, 753 F.2d 117 (4th Cir. 1981) (court relies on *Beacon Theatres* and *Dairy Queen* in reversing denial of jury trial); *Tights Inc. v. Stanley*, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971) (Fourth Circuit issues writ of mandamus directing district court to vacate order striking jury trial demands). In the rare instance where the equitable issues are tried first, *Parklane Hosiery* teaches that the Seventh Amendment does not compel the expensive, time-consuming relitigation of factual issues already decided. The Fourth Circuit's application of this rule in the *Lytle-Ritter* context comports with this philosophy and should be affirmed.[23]

In sum, the Fourth Circuit in this case correctly followed *Parklane* in holding that the district court's findings in the Title VII claim precluded relitigation of these issues. The court's reasoning will prevent needless relitigation of judges' sound findings and furthers the interest of judicial economy. Accordingly, the decision below should be affirmed.

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[22] Petitioner's assertion that federal trial judges will be induced by the Fourth Circuit's decision to try the equitable claims before the jury claims in a joint suit merely for their own convenience is unfounded. The allegation that federal judges would willingly disregard this Court's decisions, along with Petitioner's repeated implications that judges' factual determinations are inherently suspect, is an unwarranted censure of the federal judiciary.

[23] Due to the infrequent applicability of the *Lytle-Ritter* principle, Petitioner's claim that it will result in increased litigation is without merit.

III. DISMISSAL OF THE § 1981 CLAIMS HAD NO EFFECT ON THE OUTCOME OF THIS CASE

Even if the court of appeals erred in holding that relitigation of Petitioner's § 1981 claims was precluded by collateral estoppel, such error was harmless under Fed. R. Civ. P. 61 and does not warrant a new trial.[24] This Court has long recognized that when a plaintiff's evidence is insufficient as a matter of law to establish a *prima facie* case, the Seventh Amendment is not violated by the issuance of a directed verdict. *See Galloway v. United States*, 319 U.S. 372, *rehearing denied*, 320 U.S. 214 (1943). In *Galloway*, this Court pointed out that the Seventh Amendment guarantees both a plaintiff's right to have legitimate claims heard by a jury and a defendant's right to attack the legal sufficiency of plaintiff's evidence without protracted litigation. *Id.* at 392-93. The Court rejected the contention that the Seventh Amendment requires a new trial where, as here, plaintiff cannot establish a critical element of his claim. *Id.* at 394.

Other courts of appeal addressing this issue agree with the First Circuit that "there is no constitutional right to have twelve men sit idle and functionless in a jury box." *In re N-500L Cases*, 691 F.2d 15, 25 (1st Cir. 1982). For example, in *Laskaris v. Thornburg*, 733 F.2d 260 (3d Cir.), *cert. denied*, 469 U.S. 886 (1984), the Third Circuit affirmed the district court's dismissal of plaintiff's § 1981 claims alleging politically motivated discharges. The court held that the dismissal of these claims, and the affiliated right to a jury trial, constituted harmless error since the evidence adduced at trial was

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[24] This point was argued by Respondent before the court of appeals, but the court did not reach this issue. However, it is well established that a Respondent can seek affirmance on any ground disclosed by the record. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

insufficient to avoid a directed verdict if a jury had been impaneled.[25]

Indeed, the cases relied upon by Petitioner are not inconsistent with these principles. For example, in *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987), the court stated that before addressing the collateral estoppel issue, there must be an inquiry into whether the denial of a jury trial constitutes harmless error. *Hussein*, 816 F.2d at 354 n. 6.[26]

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[25] *Accord Bowles v. United States Army Corps of Engineers*, 841 F.2d 112 (5th Cir.), *cert. denied*, 109 S. Ct. 33 (1988); *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987); *Howard v. Parisian*, 807 F.2d 1560 (11th Cir. 1987); *King v. University of Minnesota*, 774 F.2d 224 (8th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986); *In re Professional Air Traffic Controllers Organization of America*, 724 F.2d 205 (D.C. Cir. 1984); *Atwood v. Pacific Maritime Association*, 657 F.2d 1055 (9th Cir. 1981); *Hildebrand v. Board of Trustees of Michigan State University*, 607 F.2d 705 (6th Cir. 1979); *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728 (10th Cir.), *cert. denied*, 389 U.S. 857 (1967).

[26] Moreover, Lytle misses the mark in attempting to avoid the harmless error principle by relying on cases involving issues such as an improper forum and the failure of a judge to recuse himself. The interests at issue in these cases differ drastically from the issue of whether the denial of a jury trial was harmless. In the forum selection context, the right infringed is the right not to be tried at all outside a particular forum. *See Lauro Lines S.R.L. v. Chasser*, —— U.S. ——, 104 L. Ed. 2d 548 (1989) (Scalia, J., concurring). The correctness or error of the factual findings in the improper forum is irrelevant to this inquiry. Similarly, the failure of a judge to recuse himself infects the entire judicial process. Even the appearance of partiality requires recusal, regardless of actual harm. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). By contrast, the denial of a jury trial can only be harmful if the jury would have been given the opportunity to decide the case. *Howard v. Parisian*, 807 F.2d 1560 (11th Cir. 1987).

Other cases cited by Lytle for this proposition are similarly unpersuasive. For example, in *Gomez v. United States*, 104 L. Ed. 2d 923 (1989), the Court noted that harmless error analysis is not applicable to a felony case. However, in *Rose v. Clark*, 478 U.S. 570 (1986), another criminal case cited by Lytle, the Court pointed out

In short, it is clear that this Court need not address the collateral estoppel issue if a directed verdict would have been proper under Rule 50(a) of the Federal Rules of Civil Procedure. Such a directed verdict is appropriate when there is a complete absence of proof on an issue material to the cause of action or when there are no controverted issues of fact upon which reasonable jurors could differ. *Brady v. Southern Railroad*, 320 U.S. 476 (1943); 5A Moore's Federal Practice at Paragraph 50.02.

The evidence presented by Petitioner in this case, even when viewed in the most favorable light, is insufficient to defeat a directed verdict.[27] As the Fourth Circuit correctly noted, "it is established beyond peradventure that the elements of a *prima facie* case of employment discrimination alleging disparate treatment under Title VII and § 1981 are identical." Pet. App. 13a-14a. Facts that preclude relief under Title VII also preclude a § 1981 claim. *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir., 1980), *cert. denied*, 449 U.S. 1113 (1981).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court established the elements necessary to make out a *prima facie* case of disparate treatment under both statutes. The Fourth Circuit has refined the elements applicable to suits, like this one, which allege discriminatory disciplinary action. *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985). *Moore* held that to establish a *prima facie* case of racial

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the strong presumption of application of harmless error analysis, even in the criminal context. The Court found the error, an improper jury instruction, was harmless.

[27] Contrary to Petitioner's assertion, the district court's denial of Schwitzer's motion for summary judgment does not indicate that Petitioner's claims would have been submitted to the jury at trial. It is well established that the denial of a motion for summary judgment does not preclude a directed verdict at trial. *Gross v. Southern Ry. Co.*, 446 F.2d 1057, 1060-61 (5th Cir. 1971); *Armco Steel Corp. v. Realty Investment Co.*, 273 F.2d 483, 485 (8th Cir. 1960).

discrimination in a case involving a discharge for violation of company rules or policies, the plaintiff must show: (1) that he is black; (2) that he was discharged for violation of a company rule; (3) that he engaged in prohibited conduct similar to that of a person of another race; and (4) that disciplinary measures enforced against him were more severe than those enforced against the other person. *Moore*, 754 F.2d at 1106.

Application of these factors reveals, as the district court found, that Lytle failed to establish a *prima facie* case. Schwitzer's absentee policy distinguishes between excused and unexcused absences, with a stricter standard for the latter based on the greater disruptive effect of unexcused absence on the company's operation. Excused absences must also be agreed to in advance by the employee's supervisor (Tr. 17-19). Lytle's testimony indicated that he asked for a vacation day on Friday, August 12, 1983. When his supervisor, Larry Miller, told him that he would still have to work Saturady, August 13, Lytle replied that he would be unable to work because he was "physically unfit." According to Lytle, Miller denied the request and told him he would have to work one of the two days. Lytle responded that he would use two vacation days if required, but expected time and one-half pay for the Saturday vacation day (Tr. 131-32). He admits that Miller walked off without granting his request. It is undisputed that Lytle left 1.8 hours early that day and did not report or call in on August 12 or 13 (Tr. 133, 172-73).

Lytle presented no evidence that Miller granted the day off or excused him from reporting to work or calling in.[28] Lytle's subjective understanding of Miller's actions is insignificant, since proof of discriminatory intent is required to establish liability under § 1981, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982),

[28] In addition, there is no evidence that Miller discriminatorily denied the requested time off.

and under Title VII's disparate treatment theory. *McDaniel v. Temple Independent School District*, 770 F.2d 1340 (5th Cir. 1985) (the issue is not whether the employer made the correct decision, but whether it intended to discriminate against the employee); *Verdell v. Wilson*, 602 F. Supp. 1427, 1434 n. 4 (E.D.N.Y. 1985) (discrimination cannot be founded on a difference of opinion).

Moreover, Lytle was unable to sustain his burden under *Moore* by identifying a single non-black employee guilty of a similar violation who was not discharged (J.A. 60). This requirement was not met by evidence of white employees with excessive *excused* absences and a white employee with six minutes of excessive unexcused absence. Schwitzer's policies clearly distinguish between excused and unexcused absences, and a six-minute violation (consisting of tardiness, not refusal to work) differs markedly from Lytle's 9.8-hour violation. Lytle's inability to identify an individual guilty of a similar offense who was treated preferentially precludes him from establishing a vital element of a *prima facie* case.

Significantly, after hearing only Lytle's evidence, the district court granted Schwitzer's motion for involuntary dismissal under Fed. R. Civ. P. 41(b) on the discriminatory discharge claim, finding, as a matter of law, that Lytle had failed to establish a *prima facie* case. In making this determination, the court recognized the difference between excused and unexcused absences under Schwitzer's attendance policy (J.A. 59), and also recognized that the *excused* absence of white employees were not as serious as Lytle's *unexcused* absences. Not only are the standards and purposes different, but the court would have had to ignore common sense and basic principles of judicial notice to come to any other conclusion. As a result, the court concluded as a matter of law that Lytle had not established a *prima facie* case of race

discrimination.[29] Although the standards vary under Rules 41(b) and 50(a), the court's decision did not rest on credibility determinations. Rather, Petitioner's inability to establish a critical element of a *prima facie* case would have guaranteed a directed verdict as a matter of law even if a jury had been impaneled. Since Schwitzer would have received a directed verdict, the denial of a jury was harmless error and remand of the case is unnecessary.

Similarly, a directed verdict would have been proper on Lytle's § 1981 retaliaton claim.[30] In order to establish a *prima facie* case of retaliation, plaintiff must prove the following three elements by a preponderance of the evidence: (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection between the

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[29] At the close of Petitioner's case, the district court made the following specific determinations:

> I will find *by plaintiff's own evidence* plaintiff had excess unexcused absence of 9.8 hours, and that, with reference to this unexcused absence, he did not follow the company policy of calling in;
>
> I will find that the conduct on the part of the white employees is not substantially similar in seriousness to the conduct for which plaintiff was discharged.

Based on these findings, the court concluded:

> I will conclude as a matter of law that the Court has jurisdiction of this matter, and that the plaintiff has established that he is a member of a protected category, and that he was discharged for violation of the company's policy, but *I will conclude as a matter of law that he has not established a prima facie case*, since he has not established that Blacks were treated differently, and in fact committed violations of the company's policy of sufficient seriousness;
>
> And I will order that the claim as to the discharge be dismissed.

(J.A. 59-60) (emphasis added).

[30] Just as with the discriminatory discharge claim, the elements for retaliation under § 1981, if allowed, are the same as those under Title VII. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984).

protected activity and the adverse action. Because Petitioner could only establish the first of the three mandatory elements, his retaliation claim was properly dismissed. *Canino v. EEOC*, 707 F.2d 468 (11th Cir. 1983) (dismissal proper when plaintiff satisfied only two elements of a *prima facie* case).

Petitioner alleged that Schwitzer treated him adversely following the filing of his EEOC charge by providing a neutral letter of reference to prospective employers which contained only his dates of employment and former job title. However, Schwitzer has a well-established company policy of providing such limited references. Indeed, Schwitzer presented evidence of several other instances when employees who had not filed EEOC charges received the same limited reference as that provided for Lytle (Tr. 264-65, 267). Although it appears that in one case a more detailed reference was supplied, this incident was a single, unintentional aberration to an otherwise uniform company policy, and there was no contrary evidence (J.A. 62-63). As a consequence, at the end of all the evidence the district court held that Lytle's retaliation claim was without foundation as a matter of law and entered judgment for Respondent under Rule 41(b) (J.A. 64). In these circumstances, even if § 1981 applies to retaliation claims, and even if attempts to prove retaliation would not be collaterally estopped, Petitioner's failure to establish a *prima facie* case would have warranted a directed verdict. Accordingly, the denial of a jury trial was harmless error under Fed. R. Civ. P. 61 and a new trial is unnecessary.[31]

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[31] In the event the Court does not affirm the decision of the court of appeals on any of the grounds discussed above, the proper remedy would be a remand for consideration of the § 1981 issue and a motion under Rule 50(a) for a directed verdict. *See Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 271 (1977); 7 Moore's Federal Practice, Paragraph 61.06.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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No. 88-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN S. LYTLE

Petitioner,

v.

HOUSEHOLD MANUFACTURING, INC.,
D/B/A SCHWITZER TURBOCHARGERS,

Respondent.

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I. The Seventh Amendment Compels Reversal of the Court of Appeals' Judgment

Respondent raises two analytically independent reasons why the denial of a jury trial in this case does not compel reversal of the dismissal of petitioner's claims. First, respondent claims that no denial of petitioner's Seventh Amendment rights ever occurred. Second, respondent argues that this Court should sanction the total disregard of the Seventh Amendment by lower courts.[1] Neither argument is supported by either this

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[1] This latter argument has two parts. The first concerns the application of collateral estoppel to deny a jury trial. As we explained in our opening brief, the Fourth Circuit's approach -- to ignore Seventh Amendment violations as insignificant procedural mishaps, and ask only whether the trial judge's findings were clearly erroneous -- would effectively write the Seventh Amendment out of the Constitution. Brief for Petitioner (Pet. Br. 47-50).

The second, that the denial of a jury in this case was harmless error, also fails. This Court's traditional practice when confronted with Seventh Amendment violations is a rejection of that approach. See Pet. Br. 35-38, discussing, e.g., Granfinanciera S.A. v. Nordberg, 109 S.Ct. 2782 (1989); Tull v. United States, 481 U.S. 412 (1987); Mecker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963). Moreover, that approach ignores the fundamental nature of the right to a jury trial. "The constitutional right to a jury trial embodies 'a profound judgment about the way in which the law should be

(continued...)

Court's prior decisions or by logic.

Respondent concedes, as it must, that the Court of Appeals found that petitioner's Seventh Amendment rights had been denied. But it seeks to support the Court of Appeals' judgment by arguing that the result -- affirmance of the district court -- was right even though

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[1](...continued)
enforced and justice administered.'" Carella v. California, 105 L.Ed. 2d 218, 223 (1989) (Scalia, J. concurring in the judgment) (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)). "It is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.'" Id. (emphasis added). It is only after that constitutionally mandated structure is in place that a court may even begin to conduct a harmless-error analysis.

In any event, application of the appropriate harmless-error standard (i.e., Chapman v. California, 386 U.S. 18, 24 (1967) and United States v. Lane, 474 U.S. 438, 446 n. 8 (1986)), to the instant case would require reversal, if this Court concludes that a properly impaneled and instructed jury could have found for Lytle. Galloway v. United States, 319 U.S. 372, 396 (1943). Given the evidence in this case, it is clear beyond any doubt that a jury that believed petitioner's testimony could have found for him on both his discharge and retaliation claims. Since there is a reasonable possibility that the outcome would have been different had the error not occurred -- the standard used in constitutional harmless error cases -- reversal is required. See, e.g., Strickland v. Washington, 466 U.S. 668, 694 (1984).

the entire analysis used to support that result was wrong. Respondent's argument, however, substantially distorts the case law and Federal Rules of Civil Procedure on which it relies.

Put simply, respondent claims that since the evidence in this case would have compelled a directed verdict, the district court should have taken the case from the jury at some point, there was no error in never empaneling a jury to begin with. That argument bespeaks both a critical misunderstanding of the relationship between Rule 41 dismissals in bench trials and Rule 50 directed verdicts in jury trials and a critical mischaracterization of the evidence at issue in this case.

The district court dismissed petitioner's discriminatory discharge claim at the close of his case, pursuant to Fed. R. Civ. P. 41(b). Contrary to respondent's suggestion, that dismissal was not equivalent

to the ruling the district court would have been called upon to make had it been faced with a motion for a directed verdict in a jury case. Rule 41(b) applies by its own terms only "in an action tried before the court without a jury." It directs the judge to determine whether "upon the facts and the law the plaintiff has shown no right to relief" (emphasis added). It explicitly provides that "the court as trier of the facts may determine them." Id. If the court enters a Rule 41(b) dismissal against the plaintiff, it "shall make findings as provided in Rule 52(a)." Id.[2]

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2 As recently explained by the Court of Appeals for the Eighth Circuit: "In ruling on a motion for directed verdict, the judge must determine if the evidence is such that reasonable minds could differ on the resolution of the questions presented in the trial, viewing the evidence in the light most favorable to the plaintiff. On a motion for directed verdict, the court may not decide the facts itself. In deciding a Rule 41(b) motion, however, the trial court in rendering judgment against the plaintiff is free to assess the credibility of witnesses and the evidence and to determine that the plaintiff has not made out a case." Continental Casualty Co. v. DHL Services, 752 F.2d 353, 355-56 (8th Cir. 1985). Accord Stearns v. Beckman Instruments, Inc., 737 F.2d 1565, 1567 (Fed.Cir. 1984) (judgment under Rule 41(b) "need not be entered in accordance with (continued...)

In a case tried before a jury, of course, these functions are the exclusive province of the jury, not the judge. Thus, there are a number of fundamental distinctions between dismissals pursuant to Rule 41(b) and granting of directed verdicts pursuant to Rule 50(a).

First, in deciding a motion for a directed verdict, the court may neither make credibility judgments adverse to the nonmoving party nor weigh the evidence.[3] Second, in deciding whether to grant a directed verdict, the court must view all the evidence and make all the factual inferences in the light most favorable to the nonmoving

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[2](...continued)
a directed verdict standard"); Wilson v. United States, 645 F.2d 728, 730 (9th Cir. 1981) ("The Rule 41(b) dismissal must be distinguished from a directed verdict under Rule 50(a)"). See generally 5 Moore's Federal Practice ¶ 41.13[4] at 41-175 to 41-179 (2d ed. 1988).

3 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). Gairola v. Commonwealth of Virginia Dept. of General Services, 753 F.2d 1281, 1285 (4th Cir. 1985); 9 Wright & Miller, Federal Practice and Procedure: Civil § 2524 at 541-42; § 2536 at 593-95 (1971).

party.[4] Finally, a court may not weigh conflicting evidence.[5]

By contrast, in deciding a Rule 41(b) motion, the judge is not required to afford these burden-shifting and burden-heightening rules. Thus, when a judge decides a Rule 41(b) motion, he decides which side he believes, and not whether all reasonable people would be compelled to favor that side. In short, the standard in a Rule 41(b) case more nearly resembles the standard used in de novo review (i.e., "which side should win?") rather than the standard used in directed verdict determinations (i.e., "could any jury find for the other side?").

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[4] Anderson v. Liberty Lobby, Inc., 477 U.S. at 255; see also, cased cited Pet. Br. 31 n. 18.

[5] Where there is any "uncertainty" as to the issue before the jury which "arises from a conflict in testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." Gunning v. Cooley, 281 U.S. 90, 94 (1930).

The district court's approach in this case provides a paradigmatic illustration of this general principle. Three examples will suffice. First, the district court's finding that plaintiff had 9.8 hours of excessive unexcused absence was crucial to its dismissal of the discharge claim. That finding necessarily rejected petitioner's testimony that his absences were due to his doctor's appointment and his physical inability to work, and that respondent's policy treated absences due to these kinds of reasons as excused absences granted as a matter of course. It might well be that a jury could disbelieve Lytle. But on a directed verdict motion, the judge could not have made that determination. Indeed, he would have been required to assume that the jury would find for Lytle if any reasonable jury could do so. And so the judge's Rule 41(b) finding reflects an issue that would have had to go to the jury in a jury case.

Second, the court declined to find that white employees charged with lateness or absence were treated more leniently that Lytle had been. Again, while a jury might have been entitled to reject Lytle's claim, that rejection would have depended on an assessment of Lytle's credibility as well as that of any of respondent's supervisory personnel who might have testified that Lytle's situation was distinguishable. That rejection would not have been within the judge's province in a jury trial case.

Finally, the district court expressly recognized that it was making findings of fact about issues on which reasonable individuals could differ. Lytle's trial counsel suggested that "the only reason Mr. Lytle is being charged with unexcused absence . . . is because of Mr. Larry Miller's decision not to consider Friday a vacation day and to make Saturday a mandatory 8-hour overtime work

period. And the misunderstanding that Mr. Lytle had about that is the only reason he didn't call in." Tr. 252-53. In response to an objection that the argument was "not necessarily supported by the evidence here" the Court stated: "It's a reasonable interpretation of the evidence." Tr. 253. Ultimately, however, the district judge rejected this "reasonable interpretation," presumably in favor of one he found more "reasonable." But, importantly, the court's statement acknowledges that a jury could have found for Lytle.[6] In light of this acknowledgement, it is simply wrong to contend that the

[6] Similarly, with regard to Lytle's claim of retaliation, a jury might well have concluded that the letter of reference given a white employee discharged during the same year was not inadvertent as the district judge found, but that no such reference was given to Lytle because he had taken action to redress an alleged violation of his federally granted rights.

Rule 41(b) dismissal was equivalent to a directed verdict, and thus that no Seventh Amendment violation occurred.[7]

II. Patterson v. McLean Credit Union Does Not Preclude Petitioner From Maintaining This Action

Respondent urges as an alternative ground for affirmance that petitioner's section 1981 claims are precluded by this Court's recent decision in Patterson v. McLean Credit Union, 105 L. Ed. 2d 132 (1989). Brief for Respondent (R. Br.) 1-18. We agree that, if this case is remanded for a jury trial, respondent could seek to invoke Patterson in any subsequent litigation regarding the scope of section 1981. There is no denying that

[7] Respondent's reliance on the Miller and Lane affidavits regarding petitioner's discharge claim (presumably as a proxy for the testimony they would have offered had they actually testified at trial -- which they did not) necessarily means that they are not claiming that a directed verdict would have been appropriate at the end of petitioner's case in chief -- since the evidence on which respondents rely would not have been in the record at that time -- but rather at the end of respondent's case.

Patterson raises a wide variety of complex and novel issues about the interpretation of section 1981. But we believe that this Court should not undertake to address those issues in the context of the instant case.

Respondent asks this Court to hold that section 1981 does not apply to racially motivated discharges.[8] But as respondent implicitly concedes (R. Br. 12), respondent did not raise that issue in the district court or the court of appeals.[9] The respondent in Patterson itself

[8] Respondent construes Patterson as overruling the dozens of circuit decisions holding section 1981 applicable to discharge claims. See, e.g., Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987); Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987); Jackson v. University of Pittsburgh, 826 F.2d 230 (3d Cir. 1988); Brady v. Allstate Insurance Co., 683 F.2d 86 (4th Cir.), cert. denied, 459 U.S. 1038 (1982); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir.) cert. denied, 401 U.S. 948 (1971); Coates v. Johnson & Johnson, 756 F.2d 524 (7th Cir. 1985); Johnson v. Yellow Freight System, Inc., 734 F.2d 1304 (8th Cir.), cert. denied, 469 U.S. 1041 (1984); Fong v. American Airlines, Inc., 626 F.2d 759 (9th Cir. 1980); Conner v. Fort Gordon Bus Co., 761 F.2d 1495 (11th Cir. 1985).

[9] Respondent agreed in the Fourth Circuit that section 1981 generally "prohibits employment discrimination on the basis of race." (Brief for Appellee, No. 86-1097, 4th Cir., p. 38). Respondent did not argue that petitioner could not have maintained an action, based

(continued...)

had failed to raise below any argument that section 1981 precluded Patterson's section 1981 promotion claim; for that reason the Court declined to resolve the sufficiency of that particular claim. 105 L. Ed. 2d at 156. Here, as in Patterson, the Court should adhere to its general practice of not addressing in the first instance issues not raised or resolved below. Tacon v. Arizona, 410 U.S. 351, 352-53 (1973); Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971). Respondent argued in the court of appeals that section 1981 does not prohibit the particular form of retaliation alleged by petitioner, but that argument was based on a theory quite unrelated to the

[9](...continued)
solely on section 1981, for a racially motivated discharge. Rather, respondent's sole contention in the lower courts was that petitioner forfeited his right to enforce the section 1981 prohibition against discriminatory discharge when petitioner "combine[d]" that section 1981 claim with a Title VII claim in the same complaint. (Id. at 37). Respondent denied that "Title VII and § 1981 claims may be brought together on the same facts," (id. at 40), an argument that would have been equally applicable to a section 1981 hiring claim. In this Court respondent has abandoned this contention.

holding in Patterson.[10] The court of appeals, moreover, did not resolve any question regarding the applicability of section 1981 to acts of retaliation.[11] Here too it would be prudent to permit the sufficiency of the retaliation claim to be addressed in the first instance by the lower courts on remand. "Questions not raised below are those on which the record is very likely to be inadequate, since

[10] Respondent urged below that the complaint failed to allege with sufficient specificity that the retaliatory act was racially motivated. (Brief for Appellee, No. 86-1097, 4th Cir., pp. 37-40).

[11] Prior to Patterson, there was a consensus among the circuits that section 1981 was indeed applicable to retaliation. See, e.g., Choudhury v. Polytechnic Institute of New York, 735 F.2d 38 (2d Cir. 1984); DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975), modified on other grounds, 520 F.2d 409 (2d Cir. 1975); Goff v. Continental Oil Co., 678 F.2d 593. 598 (5th Cir. 1982); Pinkard v. Pullman-Standard, 678 F.2d 1211, 1229, n.15 (5th Cir. 1982) (per curiam), cert. denied, 459 U.S. 1105 (1983); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980); Harris v. Richards Mfg. Co., 675 F.2d 811, 312 (6th Cir. 1982); Winston v. Lear-Siegler Inc., 558 F.2d 1266, 1268-70 (6th Cir. 1977); Greenwood v. Ross, 778 F.2d 448, 455 (8th Cir. 1985); Sisco v. J.S. Alberici Const. Co., 655 F.2d 146, 150 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Setser v. Novack Investment Co., 638 F.2d 1137, 1146 (8th Cir.), modified, 657 F.2d 932, cert. denied, 102 S.Ct. 615 (1981); London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir. 1981); Long v. Laramie County Community College Dist., 840 F.2d 743 (10th Cir. 1988).

it certainly was not compiled with those questions in mind." Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).

Respondent suggests that its prior failures to object to the section 1981 claims should be excused because the recent decision in Patterson was an "intervening change in controlling law." R. Br. 12. But the complaint whose sufficiency respondent now seeks to challenge also predates Patterson. Neither the complaint nor the answer in this case were or could have been framed with Patterson "in mind."[12] In the wake of Patterson the lower courts have generally permitted section 1981 plaintiffs to amend their complaints and pursue necessary additional discovery,[13] sensitive to Judge

[12] The section 1981 claims themselves were never tried, having been dismissed on a ground which the court of appeals held, and which respondent does not deny, was erroneous. Pet. App. 7a n. 2.

[13] English v. General Development Corp., 50 FEP Cas. 825 (N.D.Ill. 1989); Hannah v. The Philadelphia Coca-Cola Bottling Co, 1989 U.S.Dist. LEXIS 7200 (E.D.Pa. 1989); Prather v. Dayton Power & Light Co., 1989 U.S. Dist. LEXIS 10756 (S.D.Ohio 1989).

Posner's admonition that judges should recognize that such plaintiffs often face unusual difficulties when they are compelled to "negotiate the treacherous and shifting shoals of present-day federal employment discrimination law." Malhotra v. Cotter & Co., 50 FEP Cases 1474, 1480 (7th Cir. 1989). The resolution of any issues raised by Patterson regarding the claims in this case should await whatever clarification such amendment or discovery might bring. Here, as in other cases,[14] this Court should direct that the sufficiency of section 1981 claims after Patterson be assessed in the first instance by the lower courts.

Resolution of the Patterson issues in this Court is not required by the usual practice of deciding cases on statutory rather than constitutional grounds. As the

[14] Bhandari v. First National Bank of Commerce, 106 L. Ed. 2d 558 (1989); Pullman Standard v. Swint, 58 U.S.L.W. 3288 (1989); Swint v. Pullman Standard, 58 U.S.L.W. 3288 (1989).

briefs of the parties make clear, the merits of the question presented by the petition raise both a non-constitutional and a constitutional issue. We argue, first, that ordinary principles of collateral estoppel simply do not apply in this case, that reversal for a jury trial would be required even if the right to jury trial at issue were statutory rather than constitutional. (See P. Br. 41-45). The determination whether collateral estoppel would be inapplicable to a statutory right to trial by jury, of course, would not be a constitutional question. We argue, second, that if collateral estoppel would ordinarily apply in the procedural posture of this case, its application in this particular case would be inconsistent with the Seventh Amendment.[15] Although this second contention

[15] This may well be one of the admittedly uncommon cases in which it would be appropriate to address the constitutional issue. The ordinary rule in favor of avoiding constitutional questions concerns in particular cases presenting "novel" constitutional issues, Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979), or those involving constitutional challenges to statutes. Ashwander v. (continued...)

is of constitutional dimension, it is an issue the Court need not reach in order to resolve the jury trial question in our favor.

(1) Discriminatory Discharge. Respondent urges this Court to hold that all discriminatory discharges are not actionable under section 1981. If the application of section 1981 to claims of this sort necessarily gave rise to a simple rule, either including or excluding all cases that might be characterized as "discharges," this might be an issue that could appropriately be resolved at this juncture. But because of the widely differing events that may occur when an employee loses his or her job, the

[15](...continued)
Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936)(Brandeis, J., dissenting). In the instant case the constitutional issue has already been resolved, and repeatedly so, in petitioner's favor (P. Br. 34-41), and involves not a potential conflict with a co-equal branch of government, but this Court's special responsibility to supervise compliance with the Seventh Amendment by the lower federal courts. On the other hand, the complex statutory questions raised by respondent regarding the meaning of Patterson are entirely novel, having their origins in a decision less than six months old.

application of Patterson and section 1981 to discharges, like their application to promotions, is complex and fact-specific.

The mere announcement that an employee is fired may by itself do no more than terminate a contractual relationship; if that were all that occurred when a particular employee was dismissed, such an event might arguably constitute pure post-formation conduct.[16] But what actually occurs in a discharge case may in fact be more complex. Having been formally dismissed, the

[16] Several post-Patterson cases hold that all racially motivated discharges are actionable under section 1981. See, e.g., Birdwhistle v. Kansas Power and Light Co., 51 FEP Cases 138 (D. Kan. 1989); Booth v. Terminix International, 1989 U.S.Dist. LEXIS 10618 (D. Kan. 1989). At least where the discharged worker was an "at will" employee, this conclusion seems consistent with Patterson, since at-will employment is commonly regarded as "hiring at will". Corbin on Contracts, § 70 (1952); Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416,417 (1895). An employer who fires an at-will employee is not terminating an existing contract, but refusing to make new additional unilateral contracts. Since, however, at least some discharges of at-will or other employees are undeniably still actionable after Patterson, and the instant complaint thus cannot be dismissed at this juncture, it is not necessary to decide whether all discharges are still actionable.

potential plaintiff, technically already an ex-employee, at times seeks to get back his or her job, or, perhaps, some other position at the firm.[17] That a dismissed employee might immediately seek that old job, or some other position, is hardly surprising; "the victims of discrimination want jobs, not lawsuits." Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982).[18] Since the announcement of the dismissal, as respondent itself argues, ends the old contractual relationship, an ex-employee's renewed efforts to work at the firm constitute an attempt to make a new contract. If an employer spurns these overtures of a newly dismissed employee because he or she is black, that discriminatory act would

[17] See, e.g., Jones v. Pepsi-Cola General Bottlers, 1989 U.S.Dist. LEXIS 10307 (W.D.Mo. 1989)(discharge claim actionable under section 1981 because the employee, after being told he was fired, "requested a different job, offering to sweep floors if necessary, to stay employed. Defendant refused.").

[18] Indeed, petitioner sought reinstatement herein. Joint Appendix (JA) 13, par 3.

quite literally be a "refusal to enter into a contract" within the very terms of Patterson.[19] That would obviously be so in the case of a dismissed worker who applied a year later for employment, as occurred in McDonnell Douglas v. Green, 411 U.S. 792 (1978). There is no principled basis for treating differently a dismissed employee who seeks reinstatement, or a new position, a day, an hour, or a minute after his or her dismissal. On four occasions prior to Patterson this Court held actionable under section 1981 the discharge of a former employee; in each case the employee, after

[19] Padilla v. United Air Lines, 716 F. Supp. 485, 490 n. 4 (D. Colo. 1989)("Defendant's refusal to reconsider plaintiff for rehire due to discriminatory practices is clearly prohibited by § 1981"); Jones v. Pepsi-Cola General Bottlers, 1989 U.S.Dist. LEXIS 10307 (W.D.Mo. 1989)("in refusing on the basis of race to make a new contract [with the dismissed worker], defendant violated section 1981").

having been told of the dismissal decision, had taken steps to induce the employer to restore him to his job.[20]

Section 1981 would also be applicable to the termination decision itself if the employer, for racial reasons, fired a black employee for misconduct for which white employees were or would have been disciplined in a less harsh manner. Such discriminatory disciplinary practices would violate the last clause of section 1981, a provision not at issue in Patterson, which requires that blacks "shall be subject to like punishment . . . and to no other" as whites. The equal punishment clause, on the other hand, would have no application to an employer who, with no pretense of disciplinary motive, selected employees for discharge on the basis of race.

[20] McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 275 (1976)(grievance); Delaware State College v. Ricks, 449 U.S. 250, 252 (1980)(appeal of termination decision); St. Francis College v. Al-Khazraji, 481 U.S. 604, 606 (1987)(appeal of termination decision); Goodman v. Lukens Steel Co., 482 U.S. 656, 664 (1987)(grievance).

The complaint in this case, filed almost five years before Patterson, understandably does not address specifically all of the additional subsidiary facts that may be relevant, or even critical, after Patterson. The complaint does allege that respondent, prior to dismissing petitioner for an alleged violation of company rules, had chosen not to discharge whites "who have committed more serious violations of the company's rules" than had petitioner. JA 8, par. 15. This claim clearly falls within the equal punishment clause of section 1981. The complaint does not indicate, on the other hand, what petitioner may have said to company officials after the initial notice to petitioner that he had been dismissed; affidavits submitted by respondent indicate that there were at least two subsequent meetings between those officials and petitioner before petitioner finally left the

plant.[21] Under the Federal Rules of Civil Procedure, petitioner was not required in his 1984 complaint "to set forth specific facts to support [his] allegations of discrimination," or to anticipate any additional requirements that might follow from this Court's 1989 decision in Patterson. Conley v. Gibson, 355 U.S. 41, 47-48 (1957).

(2) Retaliation. Respondent urges this Court to hold that no form of retaliation is ever prohibited by section 1981, arguing that all retaliation constitutes post-formation conduct. (P. Br. 17-19). The application of section 1981 to retaliation claims raises a large number of different legal issues, because of the wide variety of circumstances in which some form of race related

[21] Petitioner testified that while he was operating his machine Larry Miller told him of the termination. Tr. 143. Subsequently petitioner apparently met both with Al Duquenne, the production superintendent, and then with the Employee Relations Department. Affidavit of Al Duquenne, p. 3.

retaliation might occur. We do not undertake to speculate as to what all those circumstances might be, or to analyze how section 1981, and Patterson, might be applied in each. It is sufficient at this juncture to observe that there are at least several types of retaliatory actions that would undoubtedly still be actionable in the wake of Patterson.

Section 1981 would certainly prevent an employer from punishing employees because they insisted, in compliance with section 1981 itself, on hiring in a racially non-discriminatory manner, or because they objected to discriminatory hiring practices forbidden by section 1981. The section 1981 prohibition against discrimination in the making of contracts includes within its penumbra protection for those who comply with or protest

violations of that statutory command.[22] Second, as this Court noted in Patterson, the equal enforcement clause of section 1981 "covers wholly private efforts to impede access to the courts or obstruct · onjudicial methods of adjudicating disputes about the force of binding obligations." 105 L.Ed. 2d at 151 (emphasis added). Thus the enforcement clause would be violated if a racially motivated employer had a practice of retaliating against any black employees who sought to enforce their contract rights. Third, section 1981 would by its own terms apply to racially motivated efforts of a third party to interfere with efforts by a black to make a contract with a new employer, including efforts triggered by a racially based retaliatory motive. Fourth, racially motivated retaliation against an individual for seeking to

[22] Malhotra v. Cotter & Co., 50 FEP Cases 1474 (7th Cir. 1989) (Cudahy, J., concurring); English v. General Development Corp., 50 FEP Cas. 825, 826-28 (N.D. Ill. 1989).

file suit or give evidence would violate the right guaranteed by section 1981 "to sue, be parties, [or] give evidence."

Racially motivated retaliation against individuals who file Title VII charges violates, at the least, the statutory rights to sue and give evidence. As this Court stressed in Patterson, the filing of a Title VII charge is a prerequisite to the commencement of a Title VII lawsuit; section 1981's protection of the right to bring that or any other lawsuit necessarily encompasses protection of the steps that are legally required in order to maintain such litigation. In addition, Title VII requires that any individual filing a Title VII charge submit an allegation "in writing under oath." 42 U.S.C. § 2000e-5(b). The submission of such a sworn statement, setting forth the

details and basis of a claimant's charge, is protected by the section 1981 guarantee of an equal right to give evidence.

Respondent urges that section 1981 does not apply to any form of retaliation related to Title VII because Title VII itself did not exist when section 1981 was first enacted. (R. Br. 17-18). But the language of section 1981 is not limited to the right to sue under, or give evidence in connection with, statutes that had been adopted prior to 1866. The Congress which enacted section 1981 certainly intended to give blacks a right to sue under or give evidence relating to whatever new statutory or common law rights might be established in the future.

Respondent argues that petitioner failed to allege that the asserted retaliation was racially motivated. The supplemental complaint asserted that respondent

"retaliated against [petitioner] for filing a charge of discrimination." (JA 40, par. 29). Respondent contends that section 1981 would not be violated if an employer had a practice of retaliating equally against all individuals, white as well as black, who filed Title VII charges. That is not a correct interpretation of section 1981, but it would be an extraordinarily strained reading of the complaint in this case to construe it as asserting the existence of such a uniform, race-neutral retaliation policy on the part of respondent. The more plausible reading of the complaint, which charges respondent with favoring whites over blacks in a variety of different ways, is as alleging respondent retaliated because a black had filed a Title VII charge. If respondent had any doubt about the precise nature of this claim, liberal pretrial procedures were available to resolve the matter. Conley v. Gibson, 355 U.S. at 47-48.

(3) Retroactivity. Respondent urges the Court to adopt a per se rule that Patterson will be applied retroactively to all cases pending on June 15, 1989. Whether a civil case should be applied retroactively depends on a number of different circumstances spelled out in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-08 (1971).

The criteria set forth in Chevron often do not yield a single rule applicable to all cases and every conceivable circumstance. Central to the Chevron analysis is whether a new decision "overrul[ed] clear past precedent on which litigants may have relied." 404 U.S. at 106. Thus the appropriateness of retroactivity in a given case will often depend, at least in part, on the precise nature of the claim, on the date when the case was filed, and on the state of the law on that date in the relevant circuit or district court. Compare Goodman v.

Lukens Steel Co., 482 U.S. 656, 663 (1987) (retroactive application of Wilson v. Garcia, 471 U.S. 261 (1985), appropriate because there was not a clear Third Circuit rule to the contrary when the suit was filed in 1973) with St. Francis College v. Al-Khazraji, 481 U.S. 604, 608-09 (1985)(retroactive application of Wilson not appropriate because there was clear Third Circuit precedent to the contrary when the suit was filed in 1980).

The appropriateness of retroactive application of Patterson will thus depend, at least in part, on the specific circumstances of each case. Defendants have sought to rely on Patterson in a variety of different types of cases, including claims alleging racially discriminatory promotions, demotions, transfers, discharges, and retaliation. The reigning law in each circuit with regard to each of these types of claims, and the date on which any controlling circuit decision was issued, vary widely, as

do the dates on which each of the still pending section 1981 actions was filed. The differences among the lower courts regarding retroactive application of Patterson reflects differences in the relevant circuit court law at the times when those various suits were initiated. See, e.g., Thomas v. Beech Aircraft Corp., 1989 U.S. Dist. LEXIS 11284 (D. Kan. 1989)(denying retroactive application of Patterson because application of section 1981 to discharge cases was "universally recognized" by Tenth Circuit precedent prior to Patterson).

Resolution of the retroactivity issue in this particular case must begin, at least, with an assessment of the relevant Fourth Circuit precedent as of December 6, 1984, the date on which the instant action was commenced. By that point in time the Fourth Circuit had held that racially motivated discharges were

actionable under section 1981;[23] the status of precedent in that circuit regarding section 1981 retaliation claims is less clear. In any event, St. Francis College and Goodman indicate that the evaluation of the state of circuit court precedents on a given date should be made in the first instance by the particular court of appeals whose decisions are at issue.

A linchpin of the decision in Patterson was the majority's concern that section 1981 not be construed in a manner that would circumvent or deter resort to the administrative machinery established by Title VII. But the petitioner in this case did file a timely Title VII charge, and thereafter included a Title VII claim in his complaint. On the other hand, the complaint alleges, the respondent attempted to prevent utilization of the Title VII administrative process by retaliating against petitioner

[23] Pope v. City of Hickory, N.C., 679 F. 2d 20 (4th Cir. 1982).

for having invoked it. In the courts below respondent repeatedly argued that a plaintiff could not pursue a section 1981 claim unless he or she withdrew any related Title VII claim; respondent actually prevailed on this theory in the district court. In this Court, respondent takes the opposite approach, arguing that petitioner's section 1981 claims should be dismissed lest a plaintiff like petitioner voluntarily ignore the "well-crafted procedures" of Title VII. (R. Br. 15.) But in the courts below, and, allegedly, when the administrative charge was filed, it was respondent who attempted, unsuccessfully, to force petitioner to forsake those very procedures. For respondent to now prevail by invoking the sanctity of the Title VII procedures which it previously sought to

eviscerate would be a perversion of the rationale of Patterson.

Respectfully submitted,

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No. 88-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN S. LYTLE,

Petitioner,

v.

SCHWITZER U.S., INC., a subsidiary of SCHWITZER, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council, with the written consent of the parties, respectfully submits this brief as amicus curiae in support of the Respondent. The letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary nonprofit association organized to promote sound government policies pertaining to employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a board of directors composed of experts in equal employment opportunity. Their combined experience gives the Council a unique depth

of understanding of the practical, as well as legal aspects of equal employment policies and requirements. The members of the Council are committed to the principles of nondiscrimination and equal employment opportunity.

As employers, the Council's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (Title VII), as well as the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Section 1981). As such, they have a direct interest in the issue presented for this Court's consideration: that is, whether a plaintiff is entitled to a jury trial under Section 1981 when a district court has properly found that the plaintiff failed to establish the *prima facie* elements of a cause of action under Title VII after a full presentation of evidence at a bench trial, but when a Court of Appeals later determines that the district court had improperly dismissed a Section 1981 claim involving the same facts and legal theories. In addition, EEAC's members have an interest in a related basis on which this Court could properly dispose of this case without even reaching the jury trial issue—that is, that Section 1981 does not cover race discrimination involving discharge or retaliation, Lytle's complaints herein, particularly after this Court's decision last term in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

Because of its interest in issues involving Section 1981, EEAC filed briefs with this Court in the *Patterson* case, both as initially argued and again upon reconsideration of *Runyon v. McCrary*, 427 U.S. 160 (1976). The Council also addressed Section 1981 issues in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (personal injury, not contract, statute of limitations applies in a Section 1981 case), *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (Section 1981 covers claims of ancestry and ethnicity discrimination, as well as that of race), and *General Building Contractors Ass'n. Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (standard of proof under Section 1981 is one of intentional discrimination).

Indeed, because of EEAC's concern related to the proof of employment discrimination cases generally, the Council has filed briefs amicus curiae in this Court in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), among others. EEAC also addressed the issue of jury trials under Title VII, *Beesley v. Hartford Fire Insurance Co.*, CA No. 89-AR-1062-S (N.D. Alabama) (decision pending), and the Age Discrimination in Employment Act, *Lorillard v. Pons*, 413 U.S. 575 (1978). Accordingly, because of its past experience with these issues, the Council is well qualified to brief the Court in this case.

STATEMENT OF THE CASE

Schwitzer dismissed John Lytle from his position as machinist on August 15, 1983, for excessive, unexcused absences. Lytle had asked his supervisor for permission to take a Friday off to visit his doctor, which his supervisor granted on condition that Lytle work on the following Saturday. Lytle not only took Friday off, but left work without authorization nearly two hours early on Thursday, and then failed to report for eight hours of work on Saturday. Because company policy does not permit more than eight hours of unexcused absences per year, Lytle was discharged.

After his discharge, Lytle began applying for jobs with other companies. In accord with established policy, Schwitzer provided Lytle's dates of employment and his job title to two prospective employers who asked for a reference. The company provided no negative information about Lytle, and both companies hired him.

Lytle, who is black, filed suit in federal district court under both Title VII and Section 1981, alleging that he

had been discharged because of his race, and that the company had retaliated against him for filing his discrimination charge when it failed to provide more favorable letters of reference. He relied on evidence that the company had once provided a favorable reference letter for a white worker. Lytle based his Title VII and Section 1981 allegations upon identical facts.

The U.S. District Court for the Western District of North Carolina, in an unreported decision, dismissed the Section 1981 claims prior to trial, holding that, in the absence of an independent factual basis for the Section 1981 suit, Title VII was Lytle's exclusive federal remedy. At the close of Lytle's presentation of evidence at a Title VII bench trial, the court dismissed the allegations of discriminatory discharge. The court held that the evidence was not sufficient to establish a *prima facie* case since Lytle failed to show that any white employees received less severe discipline for unexcused absences. The district court then entered a verdict for Schwitzer on the retaliation claim, finding that the granting of one "favorable" letter of reference to a white employee was done through "inadvertence." Joint Appendix (J.A.) at 63.

The Fourth Circuit held 2-1 that although Title VII provided an avenue of relief, the district court had erroneously dismissed the claims under Section 1981, which provided an independent source of relief on the same claim. But the appellate court also declined to order a "second" trial—this one by jury under Section 1981—reasoning that the district court's Title VII findings were entitled to collateral estoppel effect as to legal theories arising out of the same facts, as the same standards apply under both statutes. The Fourth Circuit then affirmed the district court's findings that Lytle had failed to establish a *prima facie* case of discriminatory discharge and retaliation. Judge Widener dissented, reasoning that Lytle had been denied his right to a jury trial under the Seventh Amendment to the U.S. Constitution.

SUMMARY OF ARGUMENT

The elements of a Section 1981 employment discrimination claim are identical to the elements of a Title VII disparate treatment claim. Therefore, where a trial court correctly concludes, after a bench trial on the merits, that a plaintiff has failed to establish a *prima facie* case under Title VII, it is entirely appropriate to deny a plaintiff the so-called "right" to relitigate those same facts and legal theories before a jury under Section 1981. This Court, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), indicated that a litigant is not always entitled to have a jury determine issues that have been adjudicated by a trial judge, and the Fourth Circuit below properly applied that doctrine to the instant case. Indeed, as the Fourth Circuit noted in *Ritter v. Mount Saint Mary's College*, 814 F.2d 896, 992, *cert. denied*, 484 U.S. 913 (1987), where the plaintiff has had a full and fair opportunity to litigate his claims, "one trial of common facts is enough."

Despite Petitioner's arguments to the contrary, a court's refusal to sanction a needless relitigation of the same facts under Section 1981 does not run afoul of the Seventh Amendment's right to a jury trial. As indicated by this Court in *Katchen v. Landy*, 382 U.S. 323 (1966), there are situations in which courts may dispose of equitable claims in a bench trial even though "the results might be dispositive of the issues involved in the legal claim." Thus, the Seventh Amendment is not to be applied "in a rigid manner"; where the judge has already assessed the relevant facts, there simply "is no further factfinding function for the jury to perform." *Parklane Hosiery*, 439 U.S. at 336.

Indeed, strong policy reasons support the denial of a "second" trial of common facts by a jury. For example, a plaintiff will always be able to present his evidence at the bench trial. And although the issues are not presented before a jury, all parties have had a full opportunity to litigate before an independent trier of fact.

No other persons, except those parties, are affected by the trial court's dismissal. Giving preclusive effect to the bench trial decision against those parties also promotes judicial economy by preventing needless litigation and at most results in "error" that is "harmless" to the litigant who lost—particularly where, as here, there is insufficient evidence of a *prima facie* case—because the judge would have taken the case from the jury and granted a directed verdict in any event. Given the foregoing, the decision below promotes much needed "finality" in the judicial process. This Court should adopt the rule that, at minimum, a district court may deny relitigation by a jury whenever evidence produced at the bench trial indicates that the plaintiff has failed to establish an element of his *prima facie* case, such that he would not be able to survive a motion for directed verdict.

EEAC would also stress that this Court need not even *reach* the jury issue since, under its decision last term in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), it is now apparent that claims of discharge and retaliation are not actionable under Section 1981. Rather, that law only covers the "making" and "enforcing" of a contract. *Patterson* strongly implies, and its reasoned progeny clearly hold, that discharges and instances of retaliation are neither.

Sound public policy supports this construction, in that Title VII's well-crafted conciliation and resolution procedures would be undermined by an overbroad reading of Section 1981. Moreover, it makes no sense to twist the meaning of Section 1981 to reach discharge and retaliation claims, since Title VII already covers such claims and is currently being interpreted and enforced in a manner that protects the rights of charging parties—a manner that is consistent with our national antidiscrimination laws and policies. As a result, this Court would be warranted in dismissing the petition for a writ of certiorari as improvidently granted since the issues are now moot.

ARGUMENT

I. WHERE A COURT HAS CORRECTLY FOUND THAT A PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE UNDER TITLE VII, THE PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL UNDER SECTION 1981 INVOLVING THE SAME FACTS AND LEGAL THEORIES

A. Because The Elements Of A Section 1981 Claim Are Identical To A Title VII Claim Alleging Intentional Race Discrimination, A Court May Properly Rule That "One Trial Of Common Facts Is Enough," And Thereby Deny Relitigation Of The Dismissed Title VII Claim By A Jury Under Section 1981

As the Fourth Circuit below properly noted, "it is beyond peradventure that the elements of a *prima facie* case of employment discrimination alleging disparate treatment under Title VII and § 1981 are identical." Slip Op. at 7, citing *Gairola v. Commonwealth of Virginia Department of General Services*, 753 F.2d 1281, 1285 (4th Cir. 1985), and the cases cited therein. *See Patterson v. McLean Credit Union*, 109 S. Ct. at 2378 (J. Kennedy) and 109 S.Ct. at 2390 (J. Brennan, concurring in part).[1]

The court below found that Lytle failed to establish a *prima facie* case of discrimination under Title VII, both for his discharge and his retaliation claims.[2] Specifically—as discussed more fully in Respondent's brief, and as

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[1] Other circuits agree. *See Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Jackson v. RKO Bottlers*, 743 F.2d 370, 378 (6th Cir. 1984).

[2] This Court, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), set out the elements necessary to make out a *prima facie* case of disparate treatment under both statutes. As modified by the Fourth Circuit in *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985), to address discriminatory discipline cases involving race, a plaintiff must establish these elements: (1) that he is black; (2) that he was discharged for violation of a company rule; (3) that he engaged in prohibited conduct similar to that of a person of another race; and (4) that disciplinary measures enforced against him were more severe than those enforced against the other person.

properly noted by the district and appellate courts below —Lytle left work early on Thursday, and did not report or call in on either Friday or Saturday. This behavior amounted to the unexcused use of over eight hours of leave which, under Schwitzer's policies, is a dischargeable offense. Fatal to his case, Lytle could not identify a single, non-black employee guilty of a similar violation who was treated any differently. He thus failed to establish an essential element of his discharge case. J.A. at 60.[8]

Because the elements of a Section 1981 and a Title VII disparate treatment claim are identical, the Fourth Circuit below correctly determined that "[W]here the elements of two causes of action are the same, the findings by the court in one preclude the trial of the other, and we so hold." Slip op. at 8. *See Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) ("The facts here that preclude relief under Title VII also precludes a Section 1981 claim").

To deny relitigation of the same facts and legal issues by a jury is fully supported by the decisions of this and other courts. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), this Court ruled that a litigant is not always entitled to have a jury determine issues that had been adjudicated previously by a trial judge. It adopted the view that relitigation of identical issues runs afoul of the interests of judicial economy, and does not violate the Seventh Amendment's guarantee of a right to a jury. This Court concluded that where a judge has determined facts to be adverse, "there is no further fact-finding function for the jury to perform, since the common factual issues" have been decided. *Id.* at 336. *See also Galloway v. United States*, 319 U.S. 372 (1943).

[8] Similarly, with regard to his retaliation claim, Lytle failed to establish that Schwitzer took adverse action against him, or that a causal connection existed between his filing of an EEOC charge and any adverse action—necessary elements in a retaliation claim. *See Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984). As noted by the district court below, while Schwitzer provided one favorable reference to a white worker, it was done through inadvertence, and the Fourth Circuit declined to find that the district court's decision was clearly erroneous. J.A. at 63.

Similarly, in *Ritter v. Mount St. Mary's College*, 814 F.2d 986, the Fourth Circuit ruled that a trial court's Title VII findings prevent the relitigation of those findings before a jury under a legal theory involving the same facts. In *Ritter*, a professor sued her college under Title VII, the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* After a bench trial, the district court correctly ruled that, under Title VII, she was not qualified for tenure, but erred in dismissing her claims under the EPA and ADEA. The Fourth Circuit applied *Parklane Hosiery* to deny relitigation of the EPA and ADEA claims before a jury, ruling that "[o]ne trial of common facts is enough." *Ritter*, 814 F.2d at 991. Likewise, the Fourth Circuit below correctly determined that Lytle was not entitled to relitigate his Section 1981 claim.

As we now show, a court may deny needless relitigation under such circumstances and not violate the Seventh Amendment.

B. A Court's Refusal To Permit A Needless Relitigation Of Common Facts Under Section 1981 Does Not Violate The Seventh Amendment's Guarantee Of A Jury Trial In Suits At Common Law

Petitioners argue that the Fourth Circuit's ruling erroneously deprived Lytle of his "right to a jury trial," in violation of the Seventh Amendment to the U.S. Constitution. Pet. Br. at 25. Petitioners call this right an "entitlement," the denial of which is subject to "reversal *per se*." *Id.* at 41. It is clear, however, that the Seventh Amendment is not so broad. It simply provides that "In suits at common law . . . the right to trial by jury shall be preserved. . . ." As explained fully by this Court in *Parklane Hosiery Co.*, 439 U.S. at 336, "[t]he Seventh Amendment has never been interpreted in [a] rigid manner," and "many procedural devices developed since 1791

. . . have diminished the civil jury's historic domain." For example, this Court has held that neither the doctrines of directed verdict nor summary judgment violate the Seventh Amendment. *See Galloway*, 319 U.S. at 388-93, and *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 319-21 (1902).

Of more direct relevance to the case herein, in *Katchen v. Landy*, 382 U.S. 323 (1966), this Court held that a bankruptcy court, sitting as a statutory court of equity, is empowered to decide equitable claims before deciding legal claims—even though the factual issues could just as well have been decided by a jury under the Seventh Amendment if the legal claims had been adjudicated first. *See Parklane Hosiery*, 439 U.S. at 334-35. Indeed, this Court in *Katchen* stated that "there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." 382 U.S. at 339-40. Such a situation was presented to the trial judge below. He resolved the Title VII claims at the bench trial after dismissing the Section 1981 claims. That he may have erred in dismissing the Section 1981 claims does not convert his Title VII findings into a violation of the Seventh Amendment. As this Court stated in *Parklane Hosiery*, there simply is "no further factfinding function for the jury to perform," 439 U.S. at 336.

Contrary to Petitioner's assertions, such a ruling will not diminish the effect of this Court's decision in *Beacon Theatres, Inc. v. Westover* 359 U.S. 500 (1959), or *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). Both cases stand for the proposition that, whenever possible, the right to a jury trial should be ensured in a claim containing both legal and equitable claims in the same set of facts, thus "precluding the prior determination of the factual issues by a court sitting in equity." *Ritter*, 814 F.2d at 990. But, as this Court made eminently clear in *Katchen*, 382 U.S. at 339, "[i]n neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme con-

templating the prompt trial of a disputed claim without the intervention of a jury."

Here, in stark contrast, a specific statutory scheme—Title VII—contemplates a prompt trial of the same facts and legal theories without the intervention of a jury.[4] Indeed, this Court in *Parklane Hosiery*, 439 U.S. at 334-35, explained that the premise of *Beacon Theatres* is "no more than a general prudential rule" that has since been interpreted by *Katchen* to permit a court sitting in equity to adjudicate equitable claims prior to legal claims "even though the factual issues decided in the equity action would have been triable by a jury under the Seventh Amendment if the legal claims had been adjudicated first." [5]

Petitioner contends that *Parklane Hosiery* is inapposite because it presented only the issue of whether an adverse equitable adjudication in one lawsuit collaterally estops the relitigation of the same issues before a jury in a *subsequent* legal action. Pet. Br. at 46. *See, e.g. Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987). But it is clear that this Court did not intend its rulings to have such limited effect. As the Fourth Circuit in *Ritter* stated, it is irrelevant that *Parklane Hosiery* involved a "separate suit." The error is the same: a court resolves issues that could have been resolved by a jury. *Ritter* explained:

> *It would be absurd to say that the requirement of a "prior suit" means that the facts found in a single case cannot bind the parties in that same case.* In-

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[4] Petitioners call this doctrine the "narrow *Katchen* exception," applicable to the "specialized bankruptcy scheme." Pet. Br. at 50, n.29. Clearly this Court in *Katchen* and *Parklane Hosiery* intended the doctrine to have wider applicability than is suggested by Petitioners.

[5] This Court's recent decisions in *Granfinanciera S.A. v. Nordberg*, 109 S.Ct. 2782 (1989), and *Tull v. United States*, 481 U.S. 412 (1987) are not to the contrary. Those cases merely reiterated this Court's application of the "legal-equitable" distinction in determing whether a right to jury trial exists.

deed, if the parties were not bound by the facts found in the very same case which they were litigating, then the judgments of courts issued during trial would become irrelevancies.

814 F.2d at 992 (emphasis supplied). *Ritter* properly denied relitigation, and so should this Court.

Indeed, as we now show, the policy rationales supporting the rule in *Parklane Hosiery*, *Katchen*, and *Ritter* apply with full force to the case presented herein.

C. Strong Policy Reasons Support A Court's Denial Of A Second Trial Of Common Facts, Particularly Where The Court Determines That The Plaintiff Has Failed To Establish Even A Prima Facie Case

The Fourth Circuit below recognized a number of policy concerns that support a court's denial of a "second" trial under Section 1981 where the court determines that the facts common to both Section 1981 and Title VII fail to support a case of discrimination. These policy concerns apply regardless of whether an appeals court later determines that the trial court erred in dismissing the Section 1981 claim.

The first such policy consideration is that the party seeking a second trial always will have had a full opportunity to present his evidence at the bench trial, as Lytle did here. No one is suggesting that plaintiffs be denied the ability fully and fairly to present evidence of discrimination. Indeed, Lytle attempted but failed in his showing: he could not even prove a *prima facie* case that a white person was treated any differently than Lytle for excessive, unexcused absences, or that the company gave a favorable letter of recommendation through anything other than inadvertence. In this connection, the Fourth Circuit has properly recognized that the bench trial results would be given preclusive affect only as against parties to the lawsuit. No one who was "not a party to the former suit, or did not have their interests substantially protected therein" will be touched. *Ritter*, 814 F.2d at 992.

Moreover, as properly recognized by this and other courts, a court's refusal to sanction a second trial can have the "dual purpose of protecting litigants from relitigating an identical issue. . . and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery*, 439 U.S. at 326. Indeed, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971), this Court noted that where a defendant is forced to present a complete defense on the merits in a claim that the plaintiff has litigated and lost, there is an arguable "misallocation of resources," reflecting either the "aura of the gaming table or a 'lack of discipline and of disinterestedness on the part of the lower courts.'" *Id.* at 329, citing *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180 (1952).[6]

Moreover, a litigant such as Lytle would experience no "harm" under the decision below, other than the inability to present the same facts to a jury. But, as this Court has determined in *Parklane* and other cases, the harm in denying a jury trial is insufficient to override the other policy concerns, such as a speedy resolution of disputes. *See Ritter*, 814 F.2d at 991. Even where the trial judge commits error in dismissing the Section 1981 claim, such error is harmless," particularly where, as here, the plaintiff's evidence was insufficient and the employer could have obtained a directed verdict anyway. *See Keller v. Price George's County*, 827 F.2d 952, 954-55 (4th Cir. 1987); *Dwyer v. Smith*, 867 F.2d 184 (4th Cir. 1989). Certainly, Fed. R. Civ. P. 61, the rule permitting "harmless error," would not require a new trial.

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[6] In *Ritter*, the Fourth Circuit noted that "*Parklane* decided that the judicial interest in the economical resolution of cases . . . does override the interest of the plaintiff in retrying before a jury the facts of a case determined by a court sitting in equity." 814 F.2d at 991.

Concomitant with the idea of judicial economy is the need for finality in discrimination claims in general. If this Court does not affirm the decision of the court below, and adopt the rule denying relitigation,

> . . . *then each time a legal claim is dismissed,* [*the court of appeals*] *would hear an interlocutory appeal that would in essence involve the merits of the claim,* even though a record had not been developed before a fact finder. *In the alternative, the litigants would conduct a trial to the bench, with the full knowledge that all could go for naught if any of the legal claims were reversed and a jury were entitled to determine the facts on a clean slate.* In this latter instance, the incentives of the litigants to litigate effectively would be diminished; moreover, needless time and expense would be undertaken. Thus the better rule, as enunciated in *Parklane,* is for the judge-determined issues to stand as the facts of the case. One trial of common facts is enough.

814 F.2d at 991 (emphasis supplied).

Thus, at minimum, this Court should adopt a rule that a district court may deny relitigation by jury whenever the evidence produced at trial does not make out a *prima facie* case, and the plaintiff could not avoid a directed verdict. Under Fed. R. Civ. P. 50(a), a party may move for a directed verdict at the close of the opponent's presentation of evidence. A court must grant the motion whenever there is complete absence of proof on an issue material to the cause of action. *Brady v. Southern Railroad,* 320 U.S. 476 (1943). As noted below, and as fully established in Respondent's brief, Lytle failed to present proof on essential elements of his claim. In these circumstances, to hold that the case must be retried before a jury would be particularly ludicrous, because the court would be obliged to direct a verdict in defendant's favor in any event.

II. *PATTERSON v. McLEAN CREDIT* MAKES CLEAR THAT SECTION 1981 DOES NOT COVER CLAIMS OF DISCHARGE OR RETALIATION, SINCE SUCH ACTIONS DO NOT INVOLVE THE "MAKING" OR "ENFORCING" OF A CONTRACT

A. *Patterson* And Its Reasoned Progeny Deny Section 1981 Coverage To Discharge And Retaliation Cases

Section 1981 protects the right of all persons, regardless of race, "to make and enforce contracts." 42 U.S.C. § 1981.[7] This Court in *Patterson v. McLean Credit Union* recently clarified the scope of section 1981. The Court confirmed that section 1981 is not "a general proscription of racial discrimination in all aspects of contract relations." 109 S.Ct. at 2372. Instead, the law protects only two rights: (1) the right to make contracts, and (2) the right to enforce contracts. *Id.* The Court went on to clarify what the right to "make" a contract means. According to this Court, the right to make contracts "extends only to the *formation* of a contract, but not to problems that may arise later from the conditions of continuing employment." *Id.* (emphasis supplied). As noted in *Patterson*:

> The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. *But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract* or imposition of discriminatory work-

[7] Section 1981 of 42 U.S.C. provides in full:

> *All persons* within the jurisdiction of the United States *shall have the same right* in every State and Territory *to make and enforce contracts,* to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (Emphasis supplied).

> ing conditions. Such *postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment*, matters more naturally governed by state contract law and Title VII.

Id. at 2372-73 (emphasis supplied).[8]

In this case, Lytle alleges that Schwitzer U.S., Inc. violated Section 1981 when the company terminated him for excessive, unexcused absences, and retaliated against him by not providing detailed letters of reference to potential employers. True, *Patterson* did not specifically address terminations and retaliations, but this Court's rationale applies with full force nonetheless.[9] Such actions are simply "postformation conduct," and thus remain unprotected by Section 1981. Indeed, a discharge is the antithesis of "making" a contract—it is the termination of a contract.

This interpretation is consistent with other decisions construing *Patterson* in discharge claims. Although few Courts of Appeals have issued decisions so far, the Ninth Circuit in *Overby v. Chevron USA*, 884 F.2d 470, 50 FEP Cases 1211 (9th Cir. 1989), recently held that a

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[8] The Court further explained in *Patterson* that the right to enforce contracts "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Id.* at 2373. Section 1981 protects against "efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Id.* Petitioners do not, however, argue that the Respondent impeded Lytle's enforcement of a contract. Even if Petitioners *had* made this argument, it is clear that Schwitzer U.S., Inc., in no way impeded Lytle's access to legal process.

[9] In *Leong v. Hilton Hotels Corp.* 50 FEP Cases 738, 740 (D. Hawaii 1989). the court rejected the plaintiff's argument that the resolution of discharge cases remain unaffected by *Patterson* because the Supreme Court did not specifically consider the validity of discharge claims under Section 1981.

retaliatory discharge was not actionable under Section 1981. The Court in *Overby* stated:

> Overby does not claim that Chevron prevented him from entering into a contract. To the contrary, Overby and Chevron formed a contract on February 21, 1978. Rather, he complains of postformation conduct: retaliatory discharge. Overby's right under section 1981 "to make" a contract is therefore not implicated. . . .

Id, citing *Patterson*, 109 S. Ct. at 2372-73. *Overby* went on to note that retaliatory discharge, the allegation levied against Chevron, is specifically proscribed by Title VII, and that it would "twist the interpretation" of Section 1981 to cover discharges. 50 FEP Cases at 1213.

Like the Ninth Circuit, the Sixth Circuit has come to a similar conclusion regarding discharge cases. In a case involving dismissal and demotion, the Sixth Circuit noted that "section 1981 does not encompass conduct that follows contract formation or that does not interfere with one's right to enforce established contractual duties." *Crawford v. Broadview Savings and Loan Co.*, No. 88-3694 at n.11, 1989 U.S. App. LEXIS 9921 (6th Cir. 1989).

While the district court cases involving discharges are split, most appear to agree with the *Overby* and *Crawford* rationales. For example, the court in *Leong v. Hilton Hotels Corp.*, 50 FEP Cases at 741, ruled that a racially motivated constructive discharge is not actionable under Section 1981. Significantly, the court noted that Kashiba, the plaintiff in *Leong*, experienced a "more subtle" type of harassment than did Brenda Patterson, and that Kashiba received "favorable reviews and periodic raises," while Brenda Patterson's income was affected by McLean Credit's actions. *Id.* at 740. Even so, the court in *Leong*, 50 FEP Cases at 741 ruled:

> *Clearly Brenda Patterson could have stated a constructive discharge action, more easily than Kishaba did*, had she had not been fired outright. But re-

> gardless of the label which a putative plaintiff places on the end result of discriminatory working conditions, the central, and express, holding of *Patterson* is that postformation *conduct* is not actionable under § 1981. *If postformation conduct is not actionable, then the result of such conduct, constructive discharge or simply an extraordinarily stressed or depressed employee, is irrelevant to the Supreme Court's rationale.* (Emphasis supplied).

In addition, the court in *Copperidge v. Terminal Freight Handling*, 50 FEP Cases 812 (W.D. Tenn. 1989), ruled that alleged discrimination in discharge was not covered by Section 1981 in that the "defendant's alleged discrimination did not occur at the formation of the contract, nor has it occurred when the plaintiff attempted to enforce her contract." *Id.* at 813. Similarly, in *Alexander v. New York Medical College*, No. 89 Civ. 1092, 1989 U.S. LEXIS 11433 (S.D.N.Y. Sept. 29, 1989), the court dismissed a plaintiff's discharge allegations, noting that "courts uniformly have rejected attempts to redress discriminatory discharges" after *Patterson*. Like other courts, *Alexander* reasoned that the "language of § 1981 does not invite [the] construction" that a discharge is a failure to make a contract.[10]

Significantly, courts have begun to grant motions to dismiss discharge cases involving Section 1981 at the summary judgment stage. For example, the court in *Rivera v. AT&T Information Systems, Inc.*, No. 89-B-109, 1989 U.S. Dist. LEXIS 10812 (D. Col. Sept. 13, 1989), held that the company was entitled to judgment

[10] *See also Carroll v. General Motors Corp.*, CA No. 88-2532-0, 1989 U.S. Dist. LEXIS 10481 (D. Kansas 1989); *Carter v. Aselton*, 50 FEP 251 (M.D. Fla. 1989) (same); *Greggs v. Hillman Distributing Co.*, 50 FEP 429 (S.D. Tex. 1989); *Jones v. Alltech Associates, Inc.*, No. 85 C 10345, 1989 U.S. Dist. LEXIS 10422 (N.D. Ill. 1989); *Kolb v. Ohio*, No. 87 Civ. 1314 (N.D. Ohio 1989); *Williams v. National Railroad Passenger Corp.*, 50 FEP 721 (D.D.C. 1989); and *Wilmer v. Tennessee Eastman Co.*, CA No. H-85-6742 (S.D. Tex. 1989).

as a matter of law because, "under the plain language of Section 1981, discriminatory discharge, like racial harassment amounting to breach of contract, is post contract formation conduct." *See also Riley v. Illinois Dept. of Mental Health and Development Disabilities*, No. 87 C 10436, 1989 U.S. Dist. LEXIS 7686 (N.D. Ill. 1989); *Mathis v. Boeing Military Airplane Co.*, No. 86-6002-K, 1989 U.S. Dist. LEXIS 8849 (D. Kansas 1989); *Boston v. AT&T Information Systems*, No. 88-141-B (S.D. Iowa 1989); and *Tadros v. Coleman*, No. 88 Civ. 4431, 1989 U.S. Dist. LEXIS 6895 (S.D.N.Y. 1989). Some courts have even begun to order dismissals of discharge cases *sua sponte*. *See Soffrin v. American Airlines*, 50 FEP 1245 (N.D. Ill. 1989).

Admittedly, some courts have ruled to the contrary—that Section 1981 discharge suits should not be dismissed in the same manner as harassment suits.[11] In so holding,

[11] *See, e.g., Padilla v. United Air Lines*, No. 88-A-400, 1989 U.S. Dist. LEXIS 8934 (D. Colo. 1989). At least one court has strongly criticized *Padilla* and the cases that follow its line of logic:

> *After careful consideration of the Supreme Court's opinion in Patterson, this Court has determined that it must respectfully disagree with the Colorado court* [in *Padilla*]. If there were any indication that the right to make a contract under § 1981 should be construed broadly as the right to enjoy the benefits of that contract, the Colorado court would no doubt be correct in its reasoning. But the Court in *Patterson* did not interpret the right to make a contract under § 1981 in this manner. Justice Kennedy's repeated emphasis on the distinction between conduct which occurs before a contract is formed and conduct which occurs after it is formed reflects an extremely narrow interpretation of the right to make a contract guaranteed by § 1981, one which encompasses only the right to enter into a contract. Thus, *under Patterson, once an individual has secured employment, the statute's protection of the right to make a contract is at an end.* With respect to conduct which occurs after that point—including discharge—the individual must look to the more expansive provisions of Title VII. (Emphasis supplied).

Hall v. County of Cook, State of Illinois, No. 87 C 6918, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989) (emphasis supplied). *See also*

several of these courts—most notably two decisions of the Northern District of Indiana—cite this Court's *dicta* in *Jett v. Dallas v. Independent School District*, 109 S. Ct. 2702 (1989).[12] In *Jett*, a black school principal recommended that Jett, a white football coach, be removed from his job and reassigned to a teaching position that had no coaching responsibilities.

The Court in *Jett* noted that, unlike the employer in *Patterson*, "at no stage in the proceedings has the school district raised the contention that the substantive scope of the 'right . . . to make . . . contracts' protected by § 1981 does not reach the injury suffered by [the plaintiff] here." 109 S. Ct. at 2709. Because the school district "never contested the judgment below on the ground that § 1981 does not reach [plaintiff's] injury, we assume for purposes of these cases, without deciding, that petitioner's rights under § 1981 have been violated by his removal and reassignment." *Id.* at 2710. Clearly, this Court did not back away from its holding in *Patterson* that postformation conduct (other than the creation of a "new" contract) was not actionable under Section 1981. Second, it noted that the scope of § 1981 had not even been raised in *Jett*. This Court only *assumed* in *Jett* that Section 1981 covered the defendant's conduct so that the Court could reach the remaining issues in the case.

While there is some debate among the district courts with regard to discharge, there has been no debate with regard to retaliation cases, particularly those that do

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Concurring opinion of Judge Cudahy in *Malhotra v. Cotter & Co.*, No. 88-2880 (7th Cir. Sept. 12, 1989) (retaliatory discharge claims may be adjudicated under Section 1981). It is clear, however, that this case does not involve allegations of retaliatory discharge.

[12] *See, e.g., Malone v. U.S. Steel Corp.*, Civ. No. H 83-727 (N.D. Ind. July 19, 1989); *Robinson v. Pepsi-Cola Co.*, Civ. No. H 87-375 (N.D. Ind. July 7, 1989).

not involve retaliatory firings.[13] Section 1981 is simply not applicable to retaliation claims since they involve postformation conduct. For example, in *Alexander v. New York Medical College*, *supra*, the court cited a number of other jurisdictions that have dismissed Section 1981 claims alleging a variety of postformation wrongs, and thus dismissed a plaintiff's allegation that her employer retaliated against her for filing a discrimination claim.[14]

B. Strong Policy Reasons Support The Exclusion Of Discharge And Retaliation Claims From The Scope Of Section 1981

Not only is the exclusion of discharge and retaliation claims supported by *Patterson* and its reasoned progeny, but it is supported by strong policy reasons as well. First, and foremost, it would debase the procedures established under Lytle's alternative remedial statute, Title VII. As this Court in *Patterson* stated:

> *Interpreting § 1981 to cover postformation conduct . . . would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.* In Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in

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[13] The courts in *Jordan v. U.S. West Direct Co.*, 50 FEP 633 (D. Colo. 1989), and *English v. General Dev. Corp.*, 717 F.Supp. 628 (N.D. Ill. 1989) would protect retaliatory discharges under Section 1981. The court in *Alexander*, however, "respectfully disagrees" with their holdings, LEXIS Op. at 2, noting that a retaliatory discharge "in no way obstructs access to judicial redress, as is evidenced by Ms. Alexander's presence before this Court." *Id.* at n.5.

[14] Similarly, the district court in *Dangerfield v. Mission Press*, 50 FEP Cases 1171 (N.D. Ill. 1989), ruled that plaintiffs could not maintain a claim that their employer retaliated against them for filing an EEOC charge since the defendant in no way interfered with their access to legal enforcement of their claims. Likewise, in *Williams v. National Railroad Passenger Corp.*, 50 FEP Cases 721 (D.D.C. 1989), the court refused to sanction a claim involving retaliatory downgrade for filing a Section 1981 claim.

> the workplace and to work towards the resolution of these claims through conciliation rather than litigation. . . Only after these procedures have been exhausted, and the plaintiff has obtained a "right to sue" letter from the EEOC, may she bring a Title VII action in court. . . Section 1981, by contrast, provides no administrative review or opportunity for conciliation.

109 S. Ct. at 2374-75 (emphasis supplied and citations omitted). As this Court noted, "Where conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites." While there must be some overlap between Title VII and § 1981, courts "should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.* at 2375.[15]

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[15] In this regard, the Ninth Circuit in *Overby* recently stated:

> Though an argument could be concocted that such conduct impedes, in some broad sense, Overby's access to the EEOC, the Court in *Patterson* counseled against stretching the meaning of section 1981 to protect conduct already covered by Title VII. . . . The Court reasoned that Title VII contains a comprehensive and detailed scheme, including well-crafted conciliatory procedures, for resolving disputes regarding employment discrimination . . . . Reading section 1981 too broadly would permit plaintiffs to circumvent Title VII's detailed statutory prerequisites to bringing an action in federal court, thereby frustrating Title VII's conciliatory goals and disrupting the delicate balance struck between employers and employees' rights . . . . This concern is particularly apt where, as here, the very conduct complained of centers around one of Title VII's conciliatory procedures: the filing of an EEOC complaint. Because section 704(a) of Title VII proscribes Chevron's alleged conduct, we therefore decline "to twist the interpretation of another statute (§ 1981) to cover the same conduct." . . . We hold that the district court properly granted summary judgment in favor of Chevron on Overby's Section 1981 claim.

50 FEP at 1213.

In denying Section 1981 coverage to the instant claim, other policy rationales are evident. As this Court stated in *Patterson*:

> *That egregious racial harassment of employees is forbidden by a clearly applicable law (Title VII), moreover, should lessen the temptation for this Court to twist the interpretation of another statute* (§ 1981) to cover the same conduct. . . the availability of the latter statute should deter us from a tortuous construction of the former statute to cover this type of claim.

109 S.Ct. at 2375. This Court should not construe Section 1981's language to include terminations or retaliations that in no way impair a plaintiff's access to the courts.[16]

Indeed, by reading § 1981 not as a "general proscription of racial discrimination" covering discharges and retaliation, but as "limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts," this Court will go a long way to "preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." 109 S. Ct. at 2375.

C. Courts Already Interpret And Enforce Title VII In A Manner That Protects The Rights Of Charging Parties And Is Consistent With Federal Anti-discriminatory Policy

As this Court has recognized repeatedly, Title VII's legislative history demonstrates that its detailed administrative and judicial enforcement machinery was carefully designed to balance the competing interests involved in an employment discrimination complaint. *See, e.g., Occidental Life Insurance Co. of California v. EEOC,*

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[16] Unfortunately there is already evidence that plaintiffs have begun to "artfully plead" their discharge cases to look like "making of a contract" cases. *See, e.g., Rick Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co.*, No. 88 C 7147, 1989 U.S. Dist. LEXIS 10357 (N.D. Ill. 1989).

432 U.S. 355, 359, 372-73 (1977). Delegation of enforcement authority to the Commission shifts the burden of prosecution from the individual complainant, assures employees that the agency issuing discrimination guidelines will also be the agency enforcing compliance, and encourages the settlement of disputes through informal conciliation rather than formal judicial proceedings.[17]

In addition, potential substantive conflicts between Title VII and § 1981 have been resolved in favor of those standards adopted by Congress in Title VII—even when specific exempting language of Title VII has not been found in § 1981.[18] Thus, it cannot be said that § 1981 provides more protection than Title VII in defining what discriminatory conduct is prohibited under federal law. Indeed, it is Title VII that provides more protections, because, unlike § 1981, the EEOC and Title VII plaintiffs may proceed under the adverse impact theory and are not limited to the disparate treatment model. *General Building Contractors Ass'n. Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Washington v. Davis*, 426 U.S. 229 (1976).

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[17] *See* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1200, 1270 (1971). Ultimate resort to the federal courts also delegates the tasks of investigation and fact-finding to the agency that has the specialized knowledge and resources to do so, while insuring that the private claimant will receive the most complete relief possible. Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 881 (1972).

[18] *See, e.g., Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1316, 1320 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) (seniority system that is valid under Title VII cannot be attacked under § 1981); *United States v. Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); and *United States v. East Texas Motor Freight System Inc.*, 564 F.2d 179, 185 (5th Cir. 1977) (same re Executive Order 11246).

Charging parties, moreover, have little cause to complain about the way in which Title VII's procedural requirements have been interpreted since the Act was amended in 1972, at which time the EEOC's authority was expanded. Indeed, many of the concerns that Title VII's technical requirements would adversely affect individual rights have proven to be unfounded. For example, Title VII's charge-filing requirement is *not* a jurisdictional prerequisite and, like § 1981's period, is subject to waiver, estoppel and equitable tolling.[19] Also, the limitations period gap between the two statutes has been narrowed substantially.[20] Moreover, charging parties may receive an award of attorney's fees under Title VII for work done in connection with administrative proceedings following reference to a state agency.[21]

EEOC investigations, of course, can be an extremely effective enforcement method. To illustrate, the EEOC's investigatory and subpoena enforcement authority has been applied much more broadly than would be available to the individual § 1981 plaintiff.[22] And should the EEOC decide not to sue, for whatever reason, the information developed in its investigation is available to the charging party and his attorneys once a private Title VII court suit is filed. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981). This information can thus be used as the basis for the plaintiff's private lawsuit.

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[19] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

[20] *EEOC v. Commercial Office Products Co.*, 108 C. Ct. 1666 (1988), virtually eliminated the 180-day filing period for Title VII. The Court held that the extended 300-day period applies in a deferral state even though an individual has not filed a timely 180-day charge with the state agency as required under state law. By contrast, *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), requires that § 1981 suits are governed by the state personal injury statute of limitations period, which typically is much shorter than the contract suit limitations period sought by § 1981 plaintiffs.

[21] *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

[22] *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

This Court also should be aware of several relatively recent initiatives adopted by the EEOC to increase substantially the advantages to charging parties of proceeding under Title VII. First, effective August 1, 1987, the EEOC implemented a final rule permitting charging parties to appeal "no-cause" determinations issued by the agency's district directors. See 29 C.F.R. Part 1601.19. This procedure was adopted to assure that agency investigations were impartial, thorough, legally sound, professional, and conducted in a manner that would minimize the need for charging parties to sue without EEOC assistance.

Also, on February 5, 1985, the EEOC adopted a *Policy Statement on Remedies and Relief for Individual Victims of Discrimination*, 8 Fair Empl. Prac. (BNA), 401:2615-401:2618. This policy was adopted in response to concerns that cases may be settled with less than full relief for discrimination victims. The policy provides for the following: full (not partial) back pay; enhanced reinstatement or placement rights; new notice posting requirements to inform other employees of discrimination problems; and potential direct disciplinary action against offending supervisory personnel.[23]

Moreover, when the EEOC decides to sue an employer, it may do so unencumbered by the class action limitations of Rule 23 of the Federal Rules of Civil Procedure. *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980). As this Court noted in *General Telephone*, by expanding the EEOC's enforcement powers in 1972, "Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. . . . The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 [of Title VII] was not superseded." *Id.* at 325-36.

[23] In conjunction with its enhanced remedial policy, the EEOC also has adopted tougher policies and procedures for dealing with recalcitrant employers and in seeking subpoenas. *See* 29 C.F.R. 1601.16(b)(1) and (2) [subpoenas]; and EEOC; Investigative Compliance Policy, 8 Fair Empl. Prac. (BNA) 40:2625-40:2626. Under these policies, when an employer fails to comply with requests for information in a timely or complete manner, EEOC district directors are instructed to take one or more actions including: immediate issuance of a subpoena; proceeding more directly to litigation; and drawing an adverse inference against a respondent as to the evidence sought when records are destroyed or not maintained.

Further, "EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *Id.* at 331. EEOC also may proceed unencumbered by Rule 23's requirement that an individual's claim be typical of other class members.[24] And when the district court finds that discrimination has occurred, it "has not merely the power but the duty to render a decree which will *so far as possible* eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975) (emphasis supplied).

Accordingly, EEOC-brought Title VII actions benefit the public interest, in addition to purely private concerns, in many ways that § 1981 suits do not. Individual plaintiffs, quite frankly, often are motivated primarily by an attempt to extract the maximum possible monetary award or settlement, unencumbered by administrative requirements intended to eliminate discrimination on a broader scale by the involvement of an expert agency designed to give assistance to *all* victims of discrimination.

[24] *Id.*; *Compare, General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (applicant cannot be class representative for incumbent employees).

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for a writ of certiorari as improvidently granted in lieu of Section 1981's inapplicability to discharge and retaliation claims or, in the alternative, this Court should affirm the decision of the Court of Appeals below.

Respectfully submitted,

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